



Strengthening the Equality Analysis of the European Court of Human Rights: The Potential of the Concepts of Stereotyping and Vulnerability

Alexandra Timmer

February 2014

Dissertation submitted in order to obtain the degree of Doctor of Law

Supervisor:

Prof. Eva Brems

FACULTY OF LAW

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Voor Oma

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English Summary

There is a persistent gap between human rights reality and human rights rhetoric. In theory everyone enjoys the same rights, but in practice some people are more equal than others. Women, lesbian, gay, transgender people, people with a disability, immigrants, asylum seekers, Roma and other ethnic, cultural and religious minorities continue to suffer disproportionately from discrimination, marginalization and violence, both within the Council of Europe and beyond. This is the reality that drives the present inquiry.

This thesis analyzes the legal reasoning of the European Court of Human Rights ('ECtHR', 'the Court' or 'the Strasbourg Court'). It investigates how the ECtHR can make its equality analysis more responsive to non-dominant groups. This is important, as the case law of the ECtHR provides guidance and inspiration to courts and human rights lawyers around the globe. In order to perform the legal analysis, the concepts of stereotyping and vulnerability are introduced in this thesis as novel analytical lenses. To a significant extent, the originality of this thesis lies in the concepts it employs; to my knowledge, this is the first study of ECtHR case law that focuses on stereotyping and vulnerability.

Stereotypes are beliefs about groups of people. Examples from the case law of the ECtHR are notions like women are homemakers, Roma are thieves, and people with a mental disability are incapable of forming political opinions. This thesis submits that harmful stereotyping is a human rights issue, which the Strasbourg Court needs to address more specifically and consistently than it has so far done. The amount of cases where the ECtHR explicitly acknowledges stereotypes is limited, though it is increasing. On the other hand, whereas stereotyping needs to be framed more as a human rights issue by the Court, vulnerability is clearly already framed that way. The ECtHR case law is packed with references to "vulnerable" applicants and "vulnerable groups". Vulnerability is understood in this thesis as both a universal and a particular human condition: everyone is vulnerable, but in different ways. Moreover, it is submitted that institutions – such as the Court itself – are vulnerable too.

To summarize the aims of this study: the *empirical aim* is to analyze the Strasbourg Court's case law on equal protection of non-dominant groups through the lens of the concepts of stereotyping and

vulnerability. Using these concepts, the *normative aim* of this dissertation is to suggest ways in which the Court can develop a more transformative equality jurisprudence, which addresses the underlying structural causes of inequality and discrimination.

The introductory chapter, Chapter 1, sets out the background to this thesis. In the first place, that background is constituted of the Court's case law on the prohibition on discrimination (Article 14 of the European Convention on Human Rights). In recent years, there have been rapid developments in this jurisprudence which signal a more meaningful role for Article 14. However, several problems still persist with the Court's legal reasoning on the topic of discrimination, and these are discussed as well. Next, the introductory chapter outlines the three concepts which are at the core of this thesis: equality, stereotyping and vulnerability. Equality is a deeply contested concept, and accordingly this thesis differentiates between formal, substantive and transformative equality. Equality as transformation is aimed at transforming the underlying frameworks that generate discrimination and inequality. As regards stereotyping; the central tenets of this concept are set out on the basis of social psychology literature. The concept of vulnerability is discussed primarily on the basis of the work of Martha Fineman, a legal theorist. After setting out these three concepts, the introductory chapter discusses the limits to what can be achieved by the ECtHR in terms of transformative equality. These limits consist of a principled and a practical component: in the first place it is acknowledged that the transformative potential of law (and the related discourse of rights) is inherently limited. In the second place, the institutional position of the ECtHR is such that the Court is vulnerable and cannot accomplish too much. The last part of this chapter discusses research methodology; first as regards the chapters on stereotyping, and then as regards the chapters on vulnerability. This part also explains the role that feminist legal methodology plays throughout this thesis.

After the introductory chapter there are two chapters on the concept of stereotyping in relation to the case law of the ECtHR, and then two chapters on the concept of vulnerability in relation to the case law of the ECtHR. The central tenet of Chapter Two is that stereotypes are both cause and manifestation of the structural disadvantage and discrimination of certain groups of people. Focusing on the gender case law of the ECtHR, this chapter explores what conception of equality the Court should embrace to adequately address the harmfulness of stereotypes. It terms that conception of equality transformative. This chapter proposes ways in which the Strasbourg Court can integrate an anti-stereotyping approach

in its legal reasoning. The proposed analysis consists of two phases; ‘naming’ and ‘contesting’ stereotypes. This analysis is meant to be suggestive rather than definitive: the aim is to raise the kinds of questions that the Court needs to ask in order to dismantle harmful gender stereotypes. The whole argument is illustrated by *Konstantin Markin v. Russia* and *Rantsev v. Cyprus and Russia*, two recent cases in the area of gender equality. The chapter concludes by reflecting on the feasibility of adopting an anti-stereotyping approach in light of the institutional position of the Court.

The next chapter, Chapter Three, refines these arguments by way of a comparative analysis of the case law of the American and Canadian Supreme Courts. Whereas the concept of stereotyping is novel in the case law of the ECtHR, anti-stereotyping has long been a central feature of equal protection law in both the U.S. and Canada. Thus, the aim of this chapter is to make recommendations about what the ECtHR can borrow from American and Canadian equal protection law. The chapter emphasizes that the ECtHR should not attempt to turn against *all* stereotypes, but that the Court should start seeing, naming and contesting *invidious* stereotypes. The Court should not contest all stereotypes, because stereotyping can fulfill useful functions in human interaction and, moreover, laws are always based on generalizations. This chapter shows that the Strasbourg Court can learn a great deal about the conceptualization of stereotypes and about the connections between stereotyping and discrimination from American and Canadian equal protection doctrine. Concretely, these lessons are that stereotypes take different shapes and that the Court should also watch out for statistical and prescriptive stereotypes, because these can also be invidious; that stereotyping is connected to discrimination in a self-reinforcing circle; that in distinguishing whether a stereotype is invidious, context is everything; and that there are two ways of using Article 14 and integrating the margin of appreciation.

Chapter Four shifts the inquiry to the notion of “vulnerable groups”. It draws attention to the fact that, without so far awakening much scholarly attention, the concept of vulnerable groups is gaining momentum in the case law of the Strasbourg Court. The Chapter shows that the Court has thus far used this concept in cases concerning Roma, people with mental disabilities, people living with HIV and asylum seekers. Drawing on theoretical debates on vulnerability as well as on the Court’s case law, this Chapter offers a critical assessment of the concept. Reasoning in terms of vulnerable groups opens a number of possibilities, most notably, the opportunity to move closer to a more robust idea of equality. However, the concept also has some inherent difficulties. This Chapter argues for a reflective use of the

concept and points out ways in which the Court can avoid its pitfalls. The Chapter finishes by reflecting on the institutional concerns associated with the Court's use of group vulnerability.

The vulnerability inquiry is widened in Chapter Five. It examines the concept of vulnerability more broadly in the case law of the ECtHR, with the aim of discovering what potential the concept has to more fully and consistently include the specific concerns of marginalized people into the Court's legal reasoning. To that end, this chapter deploys Martha Fineman's vulnerability thesis as a central theoretical framework within which the qualities of the Strasbourg Court's case law are assessed. After explicating the central tenets of this framework and exploring why the relationship between vulnerability and human rights law is complex, this Chapter charts and critiques the ways in which the ECtHR reasons in terms of vulnerability. It then identifies vulnerability's effects in the Strasbourg case law and proceeds to take an institutional perspective to show that the Court is also vulnerable itself. The chapter concludes with some reflections about the extent to which the ECtHR, in effect, adopts an approach consistent with the vulnerability thesis – and to what extent it has the possibility to do so.

Chapter Six forms the conclusion of the thesis. It discusses the key findings as regards the concepts of stereotype and vulnerability, and reflects on how the Court can draw on these concepts to create a legal reasoning that is more sensitive to the demands of transformative equality. It then brings these concepts together and considers the tension and synergies between them. The conclusion closes by contemplating briefly on interesting topics for future research.

Nederlandse Samenvatting

Er is een hardnekkige kloof tussen retoriek en werkelijkheid waar het mensenrechten betreft. In theorie komt iedereen dezelfde rechten toe, maar in de praktijk zijn sommigen meer gelijk dan anderen. Vrouwen, lesbiennes, homo's, transseksuelen, mensen met een beperking, immigranten, asielzoekers, Roma en andere etnische, culturele en religieuze minderheden lijden nog steeds disproportioneel veel onder discriminatie, marginalisatie en geweld. Zowel binnen als buiten de Raad van Europa. Deze realiteit is de motivatie voor dit onderzoek.

Dit proefschrift analyseert de redeneerwijzen van het Europese Hof voor de Rechten van de Mens ("EHRM", "het Hof", of "het Straatsburgse Hof"). Onderzocht wordt hoe het EHRM zijn analyse van het gelijkheidsbeginsel zo kan versterken dat het meer recht doet aan niet-dominante groepen. Dit is belangrijk, omdat de jurisprudentie van het EHRM een leidraad vormt voor rechtbanken en mensenrechten juristen over de hele wereld. Om de juridische analyse uit te voeren, worden de concepten "stereotyperingen" en "kwetsbaarheid" in dit proefschrift geïntroduceerd als analytische lenzen. Voor een aanzienlijk deel schuilt de originaliteit van dit proefschrift in die concepten; bij mijn weten is dit de eerste studie die de concepten van stereotypen en kwetsbaarheid koppelt aan de jurisprudentie van het EHRM.

Stereotypen zijn opvattingen over groepen mensen. Enkele voorbeelden uit de jurisprudentie van het EHRM zijn de opvattingen dat vrouwen voor het huishouden en kinderen horen te zorgen; dat Roma dieven zijn; en dat mensen met een verstandelijke beperking niet in staat zijn om politieke opvattingen te vormen. Dit proefschrift beargumenteert dat schadelijke stereotypen een mensenrechtelijk vraagstuk zijn, en dat het Hof stereotypen meer specifiek en consequent moet gaan aanpakken dan het tot nu toe heeft gedaan. Het aantal zaken waarin het Hof de rol van stereotypen expliciet erkend heeft is zeer beperkt, al doet het Hof dat wel steeds vaker. Aan de andere kant, "kwetsbaarheid" wordt duidelijk al gezien als een mensenrechten kwestie. De jurisprudentie van het EHRM staat vol met verwijzingen naar "kwetsbare" verzoekers en "kwetsbare groepen". In dit proefschrift wordt kwetsbaarheid opgevat als gelijktijdig een universeel en een specifiek element van het menselijk leven: iedereen is kwetsbaar, maar

mensen zijn dat op verschillende manieren en sommigen zijn kwetsbaarder dan anderen. Daarbij wordt in dit proefschrift onderstreept dat ook instituties – zoals het Hof zelf – kwetsbaar zijn.

De doelstellingen van dit onderzoek kunnen als volgt worden samengevat: de empirische doelstelling is om de jurisprudentie van het EHRM op het gebied van gelijke behandeling van niet-dominante groepen te analyseren door de lens van de concepten van stereotype en kwetsbaarheid. De normatieve doelstelling is om werkwijzen voor te stellen waarop het Hof een meer transformationele gelijkheidsjurisprudentie kan ontwikkelen. Daarmee wordt een jurisprudentie bedoeld die de onderliggende structurele oorzaken van ongelijkheid en discriminatie aanpakt.

Het inleidende hoofdstuk, Hoofdstuk Een, beschrijft de achtergrond van dit proefschrift. In de eerste plaats wordt die achtergrond gevormd door de rechtspraak van het EHRM over het verbod op discriminatie (Artikel 14 EVRM). In de afgelopen jaren zijn er snelle ontwikkelingen in de jurisprudentie geweest die duiden op een grotere rol voor Artikel 14 dan voorheen. Die ontwikkelingen worden beschreven, evenals de nog steeds bestaande problemen met de interpretatie van het Hof. Vervolgens schets dit inleidende hoofdstuk de drie kernconcepten van dit proefschrift: gelijkheid, stereotypen en kwetsbaarheid. Gelijkheid is een omstreden begrip, en dus wordt in dit proefschrift onderscheid gemaakt tussen formele, materiële en transformationele gelijkheid. Gelijkheid als transformatie richt zich op het veranderen van het onderliggende raamwerk dat discriminatie en ongelijkheid genereert; het pakt zo gezegd de wortels van ongelijkheid aan. Daarna, in het stuk over stereotypen, wordt aansluiting gezocht bij het onderzoek van sociaalpsychologen. Het concept kwetsbaarheid wordt voornamelijk besproken aan de hand van de rechtstheorie van Martha Fineman. Nadat deze drie kernconcepten uiteen gezet zijn, bespreekt het inleidende hoofdstuk wat de grenzen zijn aan de mogelijkheden van het EHRM om transformationele gelijkheidsjurisprudentie te ontwikkelen. Deze grenzen bestaan uit een principiële en een praktische component: in de eerste plaats wordt erkend dat de mogelijkheden van het recht (en het daaraan gerelateerde discours van ‘rechten’) inherent beperkt zijn. Ten tweede is de institutionele positie van het Hof kwetsbaar, en kan dus ook niet van het Hof verwacht worden dat het enorm veel bereikt. Het laatste onderdeel van dit hoofdstuk bespreekt de onderzoeksmethodiek; eerst met betrekking tot de hoofdstukken die over stereotypen gaan en dan met betrekking tot de hoofdstukken over kwetsbaarheid. Dit onderdeel verklaart ook de rol die feministische rechtsmethodologie in dit proefschrift speelt.

Na het inleidende hoofdstuk komen er eerst twee hoofdstukken over stereotypen en dan twee hoofdstukken over kwetsbaarheid. De centrale stelling van Hoofdstuk Twee is dat stereotypen zowel oorzaak als manifestatie zijn van de structurele achterstand en discriminatie van bepaalde groepen mensen. Met een focus op de rechtspraak over discriminatie op grond van geslacht, onderzoekt dit hoofdstuk wat voor conceptie van gelijkheid het Hof moet ontwikkelen om de schade die stereotypen aanrichten adequaat te kunnen aanpakken. Het noemt die conceptie van gelijkheid transformationeel. Dit onderzoek stelt manieren voor waarop het Straatsburgse Hof een anti-stereotypen benadering kan integreren in zijn jurisprudentie. De voorgestelde analyse bestaat uit twee fasen: het benoemen en vervolgens het betwisten van stereotypen. Deze analyse is suggestief bedoeld: het doel is om het soort vragen op te werpen die het Hof behoort te stellen om schadelijke genderstereotypen te ontmantelen. Dit hele betoog wordt geïllustreerd aan de hand van de zaken *Konstantin Markin t. Rusland* en *Rantsev t. Cyprus en Rusland*; twee recente uitspraken op het gebied van gender gelijkheid. Het hoofdstuk sluit af door te reflecteren op de haalbaarheid van de anti-stereotypen benadering in het licht van de institutionele positie van het Hof.

Het volgende hoofdstuk, Hoofdstuk Drie, verfijnt deze argumenten door middel van een rechtsvergelijkende analyse van de rechtspraak van de Amerikaanse en Canadese Hooggerechtshoven. Hoewel het stereotype concept nieuw is in de jurisprudentie van het EHRM, is dit al lang een centraal onderdeel van het gelijke behandelingsrecht in de VS en Canada. Zo doende is de doelstelling van dit hoofdstuk om aanbevelingen te doen over wat het EHRM kan leren van het Amerikaanse en Canadese gelijke behandelingsrecht. Dit hoofdstuk benadrukt dat het EHRM niet moet proberen zich tegen *alle* stereotypen te keren, maar dat het punt is dat het Hof *kwelijke* stereotypen moet leren herkennen, benoemen en betwisten. Het geeft geen zin om alle stereotypen te gaan betwisten, deels omdat stereotypen een nuttige functie kunnen vervullen in menselijke interactie, en deels ook omdat wettelijke regels altijd gebaseerd zijn op generalisaties. Dit hoofdstuk toont aan dat het Straatsburgse Hof veel kan leren over de conceptualisatie van stereotypen en over de connecties tussen stereotypen en discriminatie van de Amerikaanse en Canadese gelijke behandelingsdoctrines. Concreet zijn deze lessen dat stereotypen verschillende vormen aannemen, en dat het Hof ook alert moet zijn op statistische en prescriptieve stereotypen omdat die ook schadelijk kunnen zijn; dat stereotyperingen verbonden zijn met discriminatie in een zichzelf versterkende cirkel; dat het onderscheid tussen kwalijke

en niet-kwalijke stereotypen allemaal van context afhangt; en dat er twee manieren zijn waarop het Hof Artikel 14 kan inzetten en daarbij de doctrine van de beoordelingsmarge ("*margin of appreciation*") kan integreren.

Hoofdstuk Vier richt de analyse op het begrip "kwetsbare groepen". Het vestigt de aandacht op het feit dat het concept van kwetsbare groepen aan momentum wint in de rechtspraak van het Straatsburgse Hof. Dit hoofdstuk laat zien dat het Hof dit concept nu gebruikt heeft in zaken betreffende Roma, mensen met een verstandelijke beperking, mensen die HIV-positief zijn, en asielzoekers. Op basis van theoretische literatuur over kwetsbaarheid, alsook op basis van de jurisprudentie van het Hof, biedt dit hoofdstuk een kritische beoordeling van dit concept. Redeneren in termen van kwetsbare groepen heeft het potentieel om materiële gelijkheid te ontwikkelen. Er zitten echter ook inherent nadelen aan het concept. Dit hoofdstuk pleit voor een reflectief gebruik van het concept en wijst op manieren waarop het Hof valkuilen kan vermijden. Het hoofdstuk sluit af met enkele overwegingen over de institutionele problemen die het gebruik van dit concept kunnen oproepen.

Hoofdstuk Vijf verbreedt het onderzoek naar het begrip kwetsbaarheid. Het onderzoekt dit begrip in brede zin binnen de rechtspraak van het EHRM, met als doelstelling om te ontdekken wat voor potentieel het heeft om de analyse van het EHRM gevoeliger te maken voor de posities van gemarginaliseerde mensen. Daartoe gebruikt dit hoofdstuk Martha Fineman's theorie over kwetsbaarheid als centraal theoretisch kader. Binnen het kader van Fineman (en anderen) worden de kwaliteiten van de jurisprudentie van het EHRM beoordeeld. Na het uiteenzetten van Fineman's kader, wordt uitgelegd waarom de relatie tussen het idee van (menselijke) kwetsbaarheid en mensenrechten complex is. Daarna brengt dit hoofdstuk kritisch in kaart hoe het EHRM refereert aan kwetsbaarheid. Vervolgens identificeert het hoofdstuk wat voor gevolgen het Hof verbindt aan kwetsbaarheid, en neemt dit hoofdstuk ook een institutioneel perspectief door aan te tonen dat het Hof zelf óók kwetsbaar is. Het hoofdstuk sluit af met enkele beschouwingen over de mate waarin de aanpak van het Hof overeenkomt met de theorie van Fineman, en in welke mate het Hof eigenlijk wel de mogelijkheid heeft om dat te doen.

Hoofdstuk Zes vormt de conclusie van dit proefschrift. Het bespreekt de belangrijkste bevindingen wat betreft stereotyperingen en kwetsbaarheid, en overdenkt de werkwijzen waarop het Hof kan putten uit

deze concepten om een juridische analyse te creëren die meer transformationele gelijkheid bewerkstelligt. Vervolgens brengt deze conclusie die twee begrippen bij elkaar en beschouwt het zowel de synergie als de spanning tussen hen. Ten slotte brengt dit hoofdstuk interessante onderwerpen voor toekomstig onderzoek naar voren.

1. Introduction

I. Introduction: Aims of this Study

This thesis introduces stereotyping and vulnerability as novel conceptual lenses to analyze the legal reasoning of the European Court of Human Rights (“ECtHR, “the Court” or “the Strasbourg Court”). By means of these concepts, this study investigates how the ECtHR can better integrate the needs and particularities of non-dominant groups in its equality analysis. Such a fresh look at the Strasbourg Court’s equality analysis is urgently called for, because – despite the considerable advancements in human rights protection during the 60 years that the European Convention on Human Rights (“the Convention” or “ECHR”) has been in force¹ – there is a persistent gap between human rights rhetoric and human rights reality. In theory everyone enjoys the same fundamental rights, but in practice some are more equal than others. Women, lesbian, gay, bisexual and transgender people (LGBT’s), people with a disability, immigrants, asylum seekers, Roma and other ethnic, cultural and religious minorities continue to suffer disproportionately from discrimination, marginalization and violence, both within the Council of Europe and beyond.²

The Strasbourg Court is by many regarded as the most advanced human rights protection body in the world.³ Although this view smacks of complacency,⁴ it is fair to say that the Court’s judgments provide guidance and inspiration to courts and human rights lawyers around the globe. The Court’s

¹ European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222. The Convention entered into force on 3 September 1953.

² See, e.g., THOMAS HAMMARBERG, HUMAN RIGHTS IN EUROPE: NO GROUNDS FOR COMPLACENCY. VIEWPOINTS BY THOMAS HAMMARBERG COUNCIL OF EUROPE COMMISSIONER FOR HUMAN RIGHTS (2011); COMMISSIONER FOR HUMAN RIGHTS, DISCRIMINATION ON GROUNDS OF SEXUAL ORIENTATION AND GENDER IDENTITY IN EUROPE (2ND ED., 2011); and COMMISSIONER FOR HUMAN RIGHTS, HUMAN RIGHTS OF ROMA AND TRAVELLERS IN EUROPE (2012). The fact that some groups suffer more from discrimination, marginalization and violence than others, is not only reflected in the work of the Council of Europe, but also in the work of numerous NGO’s such as Human Rights Watch and Amnesty International.

³ See, e.g., MICHAEL GOLDBABER, A PEOPLE’S HISTORY OF THE EUROPEAN COURT OF HUMAN RIGHTS 189-190 (2007) at 189-190 (and the literature quoted there); and Laurence R. Helfer, *Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of European Human Rights Regime*, 19 THE EUROPEAN JOURNAL OF INTERNATIONAL LAW 125, 126 (2008).

⁴ Thomas Hammarberg, former Council of Europe Commissioner for Human Rights, emphasizes that there are “no grounds for complacency” about human rights. See HAMMARBERG, *supra* note 2.

leading role in the development of human rights norms makes it all the more important that its legal reasoning is of high-quality. Sharing this view is a large and still growing contingent of Court-watchers, who closely monitor the developments in the Court's legal reasoning, who are always ready to point out its strengths and weaknesses, and who often seek to suggest ways in which the legal reasoning could be improved.⁵ The present author is one of their number. In a sense, therefore, this thesis is a case study which forms part of the wider research project of strengthening the legal reasoning of the ECtHR.⁶

But what constitutes good legal reasoning? That is, of course, a matter of perennial debate. When it comes to strengthening the equality analysis of the ECtHR, it is submitted that it is extremely important that the legal reasoning of the Court does justice to the experiences of the rights-holders.⁷ In other words, a judgment needs to acknowledge the reality of the rights-holder in question.⁸ The only way the Court can do that, in my opinion, is by being sensitive to context.⁹ Arguably, the real moral authority of the ECtHR "inheres in its responsiveness to injustice."¹⁰ Accordingly, this thesis is sympathetic to the idea that good legal reasoning is reasoning that is capable of responding to injustice. To be clear: this thesis does not seek to develop a general "theory of interpretation" of the ECHR,¹¹ nor does it seek to build a general framework of how the Strasbourg Court could interpret the rights of non-dominant groups. Instead, this thesis offers a critical analysis of the Strasbourg case law, using the concepts of stereotyping and vulnerability.

⁵ Of recent years, Court-watchers have taken to the legal blogosphere to express their views regarding the recent developments in the Strasbourg case law. See, e.g., ECHR Blog, <http://echrblog.blogspot.com>; ECHR Sexual Orientation Blog, <http://echrso.blogspot.nl/>; Strasbourg Observers, <http://strasbourgobservers.com>; and UK Human Rights Blog, <http://ukhumanrightsblog.com>.

⁶ The research for this PhD thesis was conducted within the framework of the ERC Starting Grant project 'Strengthening the European Court of Human Rights: More Accountability Through Better Legal Reasoning', led by Professor Eva Brems. The six PhD researchers in this team – Maris Burbergs, Laurens Lavrysen, Saïla Ouald Chaib, Lourdes Peroni, Stijn Smet and myself - all work on the wider topic of strengthening the legal reasoning of the ECtHR.

⁷ In the context of equal protection law, it has long been argued that courts are prone to adopt the world-view of the perpetrators instead of the victims of discrimination. See, e.g., Alan David Freeman, *Legitimizing Racial Discrimination through Antidiscrimination Law: A Critical Overview of the Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978).

⁸ This standpoint is closely related to the idea of "procedural justice", which essentially means that, in their contact with the law, people care a great deal about the way their case is handled. One of the aspects of procedural justice is "respect": "People should be given the feeling that they and their concerns are taken seriously by the legal system." See Eva Brems & Laurens Lavrysen, *Procedural Justice in Human Rights Adjudication: The European Court of Human Rights*, 35 HUMAN RIGHTS QUARTERLY 176, 181 (2013).

⁹ The importance of a contextual analysis is further discussed in the part of this chapter that concerns methodology. See *infra* Part V.C.

¹⁰ Ann Scales, *Feminist Legal Method: Not So Scary*, 2 UCLA WOMEN'S LAW JOURNAL 1, 28 (1992). ("Outsider jurisprudence asserts that the real moral authority of the law inheres in its responsiveness to injustice.")

¹¹ Cf. GEORGE LETSAS, *A THEORY OF INTERPRETATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (2007).

Before proceeding to explain more elaborately how this thesis proposes to deploy the concepts of stereotyping and vulnerability to analyze and strengthen the Strasbourg Court's equality analysis regarding non-dominant groups, it should be acknowledged that the terminology concerning this topic is thorny. By using the term "groups", this thesis does not mean to imply that there is necessarily a great deal of cohesion or uniformity amongst the people in question.¹² Groups can be loose entities. Non-dominant groups can be broadly understood as groups who do not control the value system and rewards in a particular society.¹³ These are, in other words, the less powerful and often marginalized segments of society.¹⁴ This study does not focus on any one group in particular, but includes analysis of cases concerning women, Roma, asylum seekers, people with a physical and/or mental disability, and sexual minorities. It might as well have included cases on other non-dominant groups – like the Kurds in Turkey or religious minorities all around Europe. However, to repeat, the focus of this thesis is on legal concepts, rather than on a specific non-dominant group.

Turning now to the concept of stereotyping: stereotypes can be described as beliefs about groups of people.¹⁵ Examples from the case law of the ECtHR are notions like women are homemakers,¹⁶ Roma are thieves,¹⁷ and people with a mental disability are incapable of forming political opinions.¹⁸ This thesis submits that harmful stereotyping is a human rights issue, which the Strasbourg Court needs to address more specifically and consistently than it has so far done. There are many factors that complicate such an endeavor for the Court: stereotyping partly fulfills useful functions and stereotypes are not always harmful. Indeed, legislation is often based on stereotypes. Recognizing these

¹² There is extensive literature in the fields of law, political science and sociology pointing out problems with group-based analysis. See, e.g., Kathryn Abrams, *'Groups' and the Advent of Critical Race Scholarship*, ISSUES IN LEGAL SCHOLARSHIP: THE ORIGINS AND FATE OF ANTISUBORDINATION THEORY, Article 10 (2003); ROGERS BRUBAKER, ETHNICITY WITHOUT GROUPS (2004); and Iris Marion Young, *Status Inequality and Social Groups*, ISSUES IN LEGAL SCHOLARSHIP: THE ORIGINS AND FATE OF ANTISUBORDINATION THEORY, Article 9 (2002).

¹³ See the entry for "dominant group" in Mosby's Medical Dictionary, available at: <http://medical-dictionary.thefreedictionary.com/dominant+group>.

¹⁴ Other studies of the Convention have related marginalization to lack of political power. See Dia Anagnostou, *The Strasbourg Court, Democracy and the Protection of Marginalised Individuals and Minorities*, in THE EUROPEAN COURT OF HUMAN RIGHT AND THE RIGHTS OF MARGINALISED INDIVIDUALS AND MINORITIES IN CONTEXT 1, 2 (Dia Anagnostou & Evangelia Psychogiopoulou eds., 2010). ("By the term 'marginalised individuals and minorities' we mean those segments of the society who, due to a variety of reasons, are silenced within the democratic process, or at least are significantly constrained in voicing and pursuing their claims through it.") This study, however, purposively takes a wider view by focusing on non-dominance. Women, for example, are non-dominant even though they do have (more or less effective) access to the democratic process.

¹⁵ See *infra* Part III.B for a more thorough account of how this thesis understands the concept of stereotype.

¹⁶ See, among many other cases, Abdulaziz, Cabales, and Balkandali v. United Kingdom A 94 (1985); 7 Eur. H.R. Rep. 471; Konstantin Markin v. Russia (GC), App. No. 30078/06, 56 Eur. H.R. Rep. 8 (2013).

¹⁷ See, e.g., Aksu v. Turkey (GC), App. Nos. 4149/04; 41029/04, 15 March 2012.

¹⁸ Alajos Kiss v. Hungary, App. No. 38832/06, 20 May 2010.

complexities, this thesis yet sounds the alarm bells about stereotyping, as stereotypes generate and reinforce inequality. They are the preconceptions that underlie inequality and discrimination; they are what make it so hard to turn formal legal entitlements to equal treatment into a substantive reality for non-dominant groups. Thus, in Chapters Two and Three, this thesis aims to deploy the concept of stereotyping to develop a more transformative equality jurisprudence; meaning a jurisprudence which contests and seeks to transform the root-causes of inequality and discrimination.¹⁹

Whereas stereotyping needs to be framed as a human rights issue by the Strasbourg Court, vulnerability is clearly already framed that way. Indeed, both human rights law (including Strasbourg case law) and human rights literature are packed with references to “vulnerable groups” and “vulnerability”, and the amount of references is steadily increasing. Despite vulnerability’s great legal momentum, however, most of the time this term seems to be used mechanically, without real reflection on its content. Thus filling a void, this thesis provides an analysis of the concept of vulnerability in the case law of the ECtHR, in order to uncover the potential of this concept to strengthen the ECtHR’s reasoning as regards non-dominant groups – who the Court often designates as “vulnerable”. What promise holds this concept to develop a more transformative notion of equality in the Court’s case law? Vulnerability is understood in this thesis as both a universal and a particular human condition. Moreover, it is submitted that institutions are vulnerable too.²⁰ Chapters Four and Five will detail how, in the Court’s case law, vulnerability is something some groups suffer from; it is not referred to as a universal experience. In the same Chapters, it will be explored what effects vulnerability has in the jurisprudence of the Strasbourg Court: these effects, it will turn out, are very real and range from enhanced positive obligations on the part of the State to a narrowing of the margin of appreciation.²¹

By reference to the concepts of stereotyping and vulnerability, the aim of this thesis can be described as having an empirical and a normative component. The *empirical aim* of this study is to analyze the Strasbourg Court’s case law on equal protection of non-dominant groups through the lens of these concepts. The *normative aim* of this dissertation is to suggest ways in which the Court can develop a more transformative equality jurisprudence, which addresses the underlying structural causes of

¹⁹ See *infra* Part III.A for discussion of the different forms of equality which this thesis distinguishes, namely formal, substantive and transformative equality.

²⁰ Vulnerability not only characterizes humans and human-built institutions, but it also inheres in animals and the environment. It is beyond the scope of this thesis to go into wider questions of vulnerability, but see, e.g., Ani B. Satz, *Animals as vulnerable subjects: beyond interest-convergence, hierarchy, and property*, in VULNERABILITY: REFLECTIONS ON A NEW ETHICAL FOUNDATION FOR LAW AND POLITICS (Martha Fineman & Anna Grear eds., 2013).

²¹ See *infra* Chapter 4.IV; Chapter 5.IV; and Chapter 6.III.D.

inequality and discrimination. The primary focus of this analysis is thereby on the role of Article 14 (the Convention's non-discrimination provision²²). However, the Court has the tendency to cover the egalitarian aspects of an application under one of the free-standing Convention articles, without invoking Article 14. For example, the Court has several times addressed the disadvantaged position of gay people through Article 8 (the right to private and family life),²³ as well as Article 11 (the right peaceful assembly and freedom of association);²⁴ it has addressed the equality of minority religious groups under Article 9 (the freedom of religion);²⁵ and it has addressed the disadvantaged position of Roma under Article 8.²⁶ This means that an analysis of the equality jurisprudence would miss crucial cases if it were to focus exclusively on Article 14 case law. The present analysis will therefore focus on, but not confine itself to, Article 14 jurisprudence.

In what follows, Part 2 will situate this study in the broader context of the Court's non-discrimination case law and the scholarship on this topic: first the basic elements of Article 14 analysis will be set out; then recent developments in the jurisprudence which signal a more meaningful role for this non-discrimination provision will be discussed; and closing this part is a look at the problems that still persist in Article 14 jurisprudence. Part 3 will outline the core concepts of this dissertation, namely equality, stereotyping and vulnerability. Part 4 briefly takes stock of the limits to the Court's abilities to achieve change: first it is acknowledged that there are fundamental critiques of rights which point out that it is problematic to resort to human rights law to ameliorate the position of disadvantaged groups, and, second, more practical difficulties will be discussed which have to do with the institutional position of the Strasbourg Court. Part 5 discusses the research methods that have been used in this thesis. The methods of the chapters that explore the concept of stereotyping are discussed first, followed by a discussion of the methods of the chapters that concern the concept of vulnerability. This part closes by addressing the issue of method on a more conceptual/ideological level, namely by discussing the role of

²² Article 14 ECHR is supplemented by Protocol 12 to the Convention, which contains a free-standing right to non-discrimination. Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 2000, E.T.S. 177. *See infra* text accompanying note 32.

²³ *See, e.g.,* Smith and Grady v. UK, app. Nos. 33985/96 and 33986/96, 27 September 1999 (concerning the participation of homosexuals in the military).

²⁴ *See, e.g.,* Bączkowski and Others v. Poland, App. No. 1543/06, 3 May 2007 (concerning the prohibition of a LGBT equality parade).

²⁵ *See, e.g.,* Bayatyan v. Armenia (GC), App. No. 23459/03, 7 July 2011, ¶ 126 (concerning the conscientious objection of a Jehovah's witness to military service).

²⁶ *See, e.g.,* V.C. v. Slovakia, App. No. 18968/07, 8 November 2011; and N.B. v. Slovakia, app. no. 29518/10, 12 June 12 (concerning the forced sterilization of Roma women).

feminist legal methods in this study. Part 6 concludes the present introductory chapter by outlining the structure of this thesis.

II. Background: developments in Article 14 ECHR jurisprudence

This part will provide general background to the PhD articles in Chapters Two to Five by outlining the contours of the Court's non-discrimination jurisprudence. First the central tenets of this jurisprudence will be summarized (section A); then several recent developments in this jurisprudence will be discussed which signal a more significant role for Article 14 than it used to have (section B); and finally some continuing problems with Article 14 jurisprudence will be highlighted (section C).

A) *The Central Tenets of the Court's Approach to Discrimination*²⁷

The prohibition of discrimination is laid down in Article 14 of the Convention, which states:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

The Court established the basic framework for its analysis of this provision in the very first Article 14 case it decided on the merits: the *Belgian Linguistics* case of 1968.²⁸ This case concerned Belgian legislation that restricted the use of French in Flemish schools. The Court held that "the principle of equality of treatment [in the exercise of a right laid down in the Convention] is violated if the distinction has no objective and reasonable justification".²⁹ In this early case, the Court also affirmed the accessory nature of Article 14 – meaning that it has no independent existence and is applicable only in relation to

²⁷ For good general overviews of the Article 14 case law, see, e.g., ODDNÝ MJÖLL ARNARDÓTTIR, *EQUALITY AND NON-DISCRIMINATION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (2003); D.J. Harris, M. O'Boyle, Colin Warbrick & Ed Bates, *LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS*, Ch. 15 (2009); Janneke Gerards, *Gelijke Behandeling en het EVRM, Artikel 14 EVRM: van krachteloze waarborg naar 'norm met tanden'?*, 29 NJCM-BULLETIN 176 (2004).

²⁸ Case "Relating to Certain Aspects of the Laws on the Use of Languages in Education Belgium" 4 Eur. Ct. H.R. (ser. A) (1968).

²⁹ *Id.*, p. 31 at 10.

the rights set forth in the Convention.³⁰ In other words, Article 14 can only be invoked if a case falls within the “ambit” of another Convention Article.³¹ In *Belgian Linguistics* the Court added, however, that Article 14 is applicable also when none of the substantive Articles of the Convention is violated standing alone. The fact that Article 14 does not contain a free-standing right to non-discrimination significantly limits the scope of this provision. Protocol 12 to the Convention, which entered into force in 2005, is aimed at rectifying this situation. Protocol 12 states in its first Article that:

1 The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

2 No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.³²

However, this Protocol has not generated a substantive body of case law yet – in fact, only one case has so far been examined on the merits under this Protocol.³³

The discrimination grounds listed in both Article 14 and Protocol 12 are not exhaustive, as is illustrated by the words “discrimination on any ground” and “other status”.³⁴ This broadens the potential scope of these provisions, as grounds that are not explicitly listed can be included by the Court. The Court has done so with the grounds of sexual orientation³⁵ and disability,³⁶ for example.

Based on early articulations like the one in *Belgian Linguistics*, the Grand Chamber now regularly defines discrimination as follows:

³⁰ *Id.*, p. 30 at 9.

³¹ On the ambit of Article 14, see, e.g., Robert Wintemute, “*Within the Ambit*”: How Big is the “Gap” in Article 14 *European Convention on Human Rights*?, *EUROPEAN HUMAN RIGHTS LAW REVIEW* 366 (2004).

³² As of 1 August 2013, 18 of the 47 Council of Europe countries have ratified this Protocol.

³³ *Sejdić and Finci v. Bosnia and Herzegovina*, App. Nos. 27996/06 and 34836/06, 22 December 2009. In the case of *Savez Crkava “Riječ života” and Others v. Croatia* the Court held that it was not necessary to examine the Protocol No. 12 complaint separately. See *Savez Crkava “Riječ života” and Others v. Croatia*, App. No. 7798/08, 9 December 2010, ¶ 114-115.

³⁴ Oddný Mjöll Arnardóttir, *Non-Discrimination under Article 14: the Burden of Proof*, 51 *SCANDINAVIAN STUDIES IN LAW* 13, 14 (2007). For analysis of the discrimination grounds see Janneke Gerards, *The Discrimination Grounds of Article 14 of the European Court of Human Rights*, 13 *HUMAN RIGHTS LAW REVIEW* 99 (2013).

³⁵ *Salgueiro da Silva Mouta v. Portugal*, App. No. 33290/96, 21 December 1999, ¶ 28.

³⁶ *Glor v. Switzerland*, App. No. 13444/04, 30 April 2009, ¶ 80.

“Discrimination for the purposes of Article 14 of the Convention means treating differently, without an objective and reasonable justification, persons in relevantly similar situations.”³⁷

In the case of *Thlimmenos v. Greece* (2000) it has added to this definition by holding that:

“the right not to be discriminated . . . is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.”³⁸

These two formulations of discrimination are two sides of the same coin: states are under an obligation to treat similar cases similarly, and they are under an obligation to treat different cases differently.

In the second stage of its analysis, the Court turns to justifications. Once the applicant has shown that there is a difference in treatment, it is for the Government to prove that this treatment is justified.³⁹ This means that it will have to prove that the difference in treatment pursued a legitimate aim and that a reasonable relationship of proportionality existed between the means employed and the aim sought to be realized.⁴⁰ This is where the Court usually brings into play its margin of appreciation doctrine: Governments “enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a difference in treatment.”⁴¹ The width of the margin of appreciation determines how strict the Court will scrutinize the Government’s conduct. In the context of discrimination, the Court has developed the “very weighty reasons test”, which essentially means that the Court will scrutinize distinctions made on some grounds more strictly than others: some differences

³⁷ *Aksu v. Turkey* (GC), App. Nos. 4149/04; 41029/04, 15 March 2012, ¶ 43. See also *D.H. and Others v. the Czech Republic* (GC), App. No. 57325/00, 47 Eur. H. R. Rep. 3, ¶175 (2007); *Muñoz Díaz v. Spain*, App. No. 49151/07, 8 December 2009, ¶ 47, *Şerife Yiğit v. Turkey* (GC), App. No. 3976/05, ¶ 67; *Aksu v. Turkey* (GC), App. Nos. 4149/04; 41029/04, 15 March 2012, ¶ 43.

³⁸ *Thlimmenos v. Greece* (GC), App. No. 34369/97, 6 April 2000, ¶ 44. *Thlimmenos* concerned a Jehovah’s Witness who was a conscientious objector to military service and who was subsequently convicted for insubordination. This conviction later prevented him from being able to become a chartered accountant. The applicant complained that the Government had failed to distinguish between persons convicted of offences committed because of their religious beliefs and persons convicted of other offences. The Strasbourg Court agreed with him.

³⁹ See, e.g., *D.H. and Others v. the Czech Republic* (GC), App. No. 57325/00, 47 Eur. H. R. Rep. 3, ¶177 (2007). Though, in reality, the Court often meshes these two steps (scope and justification) in its analysis. See Janneke Gerards & Hanneke Senden, *The Structure of Fundamental Rights and the European Court of Human Rights*, 7 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 619 (2009).

⁴⁰ See, e.g., *Konstantin Markin v. Russia* (GC), App. No. 30078/06, 56 Eur. H.R. Rep. 8 (2013), ¶ 125; *Chabauty v. France* (GC), App. No. 57412/08, 4 October 2012, ¶ 49.

⁴¹ See, e.g., *Konstantin Markin v. Russia* (GC), App. No. 30078/06, 56 Eur. H.R. Rep. 8 (2013), ¶ 126. See generally about the margin of appreciation, e.g., Eva Brems, *The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights*, 56 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VOLKRECHT 240 (1996); ANDREW LEGG, THE MARGIN OF APPRECIATION IN INTERNATIONAL HUMAN RIGHTS LAW: DEFERENCE AND PROPORTIONALITY (2012).

in treatment require “very weighty reasons” before they “could be regarded as compatible with the Convention”.⁴² In other words: when the Court applies the very weighty reasons test, it applies a narrow margin of appreciation. So far distinctions on the basis of sex,⁴³ race,⁴⁴ sexual orientation,⁴⁵ nationality,⁴⁶ illegitimate birth,⁴⁷ religion,⁴⁸ mental faculties,⁴⁹ and HIV-status⁵⁰ call for very weighty reasons.

B) Article 14: Cinderella Has Come to the Ball

The equal protection case law of the ECtHR is a dynamic research topic. The fortunes of Article 14 have recently been likened to the story of Cinderella: after years of neglect – in which the Court hardly examined applications under this Article, adhered largely to a formal conception of equality,⁵¹ and did not develop its legal reasoning under this provision much – the Article has finally appeared in the Court’s ballroom.⁵² The Court is increasingly adjudicating cases under the prohibition of discrimination and its legal reasoning on that topic is gaining depth. Naturally, this has not escaped the notice of Court watchers.⁵³ In what follows, this section will briefly set out the most salient recent developments in the Court’s Article 14 analysis.

⁴² See, e.g., *Konstantin Markin v. Russia* (GC), App. No. 30078/06, 56 Eur. H.R. Rep. 8 (2013), ¶ 127.

⁴³ See, e.g., *Abdulaziz, Cabales, and Balkandali v. United Kingdom* A 94 (1985); 7 Eur. H.R. Rep. 471, ¶ 78.

⁴⁴ See, e.g., *Oršuš and Others v. Croatia* (GC), App. No. 15766/03, 52 Eur. H. R. Rep. 7 (2010), ¶ 149. Indeed, as regards racial discrimination the Court now seems to take one step further, as it has declared that “no difference in treatment which is based exclusively or to a decisive extent on a person’s ethnic origin is capable of being objectively justified in a contemporary democratic society”. *D.H. and Others v. the Czech Republic* (GC), App. No. 57325/00, 47 Eur. H. R. Rep. 3, ¶ 176 (2007).

⁴⁵ See, e.g., *Karner v. Austria*, App. No. 40016/98, 24 July 2003, ¶ 37.

⁴⁶ *Gaygusuz v Austria*, App. No. 17371/90, 10 September 1996, ¶ 42. For discussion see, Marie-Bénédicte Dembour, *Gaygusuz Revisted: The Limits of the European Court of Human Rights’ Equality Agenda*, 12 HUMAN RIGHTS LAW REVIEW 689 (2012).

⁴⁷ *Inze v. Austria* A126 (1987); 10 EHRR 394, ¶ 41.

⁴⁸ *Vojnity v. Hungary*, App. No. 29617/07, 12 February 2013, ¶ 36.

⁴⁹ *Alajos Kiss v. Hungary*, App. No. 38832/06, 20 May 2010, ¶ 42.

⁵⁰ *Kiyutin v. Russia*, App. No. 2700/10, 53 Eur. H.R. Rep. 26, ¶ 63 (2011).

⁵¹ Section III.A of this chapter, *infra*, will explicate the meaning of the term formal equality.

⁵² Rory O’Connell, *Cinderella Comes to the Ball: Article 14 and the Right to Non-discrimination in the ECHR*, 29 LEGAL STUDIES 211 (2009).

⁵³ See e.g., Samantha Besson, *Evolutions in Non-Discrimination Law within the ECHR and the ESC Systems: It Takes Two to Tango in the Council of Europe*, 60 AMERICAN JOURNAL OF COMPARATIVE LAW 147 (2012); Carmelo Danisi, *How Far Can the European Court of Human Rights Go in the Fight Against Discrimination? Defining New Standards in Its Nondiscrimination Jurisprudence*, 9 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 793 (2011); Gerards, *supra* note 34; and O’Connell, *supra* note 52.

First of all, the Grand Chamber has built on the *Thlimmenos*-test by unequivocally holding in *D.H. and Others v. Czech Republic* (2007) that the Convention also covers *indirect* discrimination.⁵⁴ Indirect discrimination occurs when a general policy or measure which is couched in neutral terms creates a disproportionate negative impact on a protected group.⁵⁵ The Court also confirmed in *D.H. and Others* that discrimination need not arise from legislative measures, but that it can also result from a *de facto* situation.⁵⁶ *D.H.* concerned the *de facto* segregation of Roma children in special schools that were vastly inferior to the normal schools. Both the *Thlimmenos* and *D.H. and Others* rulings are extremely important, because they make clear that the Convention covers both direct and indirect discrimination. Both rulings are also significant because they signal that the Court can recognize the need to accommodate difference. These cases should be distinguished though. *Thlimmenos* concerns a claim of unjustified similar treatment:⁵⁷ the applicant in this case claimed that the State ought to have differentiated between people who were convicted as a direct result of their religious beliefs and people who were convicted because of other reasons. *D.H. and Others* concerns a claim of unjustified differential treatment:⁵⁸ the group of Roma schoolchildren (and their parents) claimed that they should not have received disadvantageous treatment compared with other schoolchildren.

The judgment of *D.H. and Others* is also important for what it said about evidence in indirect discrimination cases. In the past the Court held that statistical data could not in themselves constitute evidence of a discriminatory practice.⁵⁹ In *D.H.* the Court explicitly distanced itself from this approach. It held that if applicants bring forward reliable statistical data this can be enough evidence for a *prima facie* finding of indirect discrimination, which then shifts the burden of proof to the State to establish that the law or measure in question was justified.⁶⁰ This can greatly ease the applicants' burden in raising a presumption of indirect discrimination. To what extent statistical data can be adduced as evidence in cases of indirect discrimination outside of the educational sphere is not yet clear, however.

⁵⁴ *D.H. and Others v. the Czech Republic* (GC), App. No. 57325/00, 47 Eur. H. R. Rep. 3, ¶176 (2007).

⁵⁵ *Id.* For discussion see, e.g., O'Connell, *supra* note 52, at 220-221.

⁵⁶ *D.H. and Others v. the Czech Republic* (GC), App. No. 57325/00, 47 Eur. H. R. Rep. 3, ¶175 (2007). The first time the Court held this was in *Zarb Adami v. Malta*, App. No. 17209/02, 44 Eur. H.R. Rep. 3, ¶ 76 (2006).

⁵⁷ *Thlimmenos v. Greece* (GC), App. No. 34369/97, 6 April 2000, ¶ 42.

⁵⁸ *D.H. and Others v. the Czech Republic* (GC), App. No. 57325/00, 47 Eur. H. R. Rep. 3, ¶183 (2007).

⁵⁹ *Hugh Jordan v. the United Kingdom*, App. no. 24746/94, 4 May 2001, ¶ 154.

⁶⁰ *D.H. and Others v. the Czech Republic* (GC), App. No. 57325/00, 47 Eur. H. R. Rep. 3, ¶188-189 (2007). Earlier judgments paved the way for this ruling in *D.H.* See particularly *Hoogendijk v. Netherlands (adm.)*, App. No. 58641/00, 6 January 2005, p. 21-22; and *Zarb Adami v. Malta*, App. No. 17209/02, 44 Eur. H.R. Rep. 3, ¶ 77-78 (2006).

Another evolution in the Article 14 case law concerns the Court's development of the doctrine of positive obligations.⁶¹ As early as the *Belgian Linguistics* case the Court has held that differential treatment can be permitted under Article 14 when it serves to correct an existing inequality,⁶² but in the case of *Stec and Others v. UK* (2006) the Court went one step further and indicated that there can actually be a duty to correct inequality.⁶³ *Stec* concerned a complaint about the cut-off date for reduced earnings allowances, which were linked to pensionable age: in the UK the pensionable age for women was 60 whereas the age for men was 65. In *Stec* the Grand Chamber held that "in certain circumstances a failure to attempt to correct inequality through different treatment may in itself give rise to a breach of Article 14."⁶⁴ This observation is dicta in *Stec*,⁶⁵ but the case of *Horváth and Kiss v. Hungary* (2013) really turns on the issue of a duty of affirmative action.⁶⁶ *Horváth and Kiss* is another case concerning the misplacement of Roma children in special schools. The Court found that the applicants successfully established a *prima facie* indication of indirect discrimination and then it found that the Government did not succeed in showing that it had taken adequate measures to ensure that Roma children with a mental disability were placed in the right schools. The Court formulates the positive equality duty as follows: "the Court considers that the State has specific positive obligations to avoid the perpetuation of past discrimination or discriminative practices disguised in allegedly neutral tests."⁶⁷ And it even goes further by referring to "the positive obligations of the State to undo a history of racial segregation in special schools".⁶⁸ Chapters Four and Five will analyze this judgment as part of the Court's development of the vulnerable group concept, but for now I just wish to note that the Court has considerably deepened the notion of positive equality duties.

Indeed, the judgments of *Belgian Linguistics*, *Thlimmenos*, *Stec* and *Horváth and Kiss* can be viewed as existing along a continuum. In *Belgian Linguistics* the Court observed that a positive

⁶¹ See generally about positive equality duties, e.g., SANDRA FREDMAN, HUMAN RIGHTS TRANSFORMED: POSITIVE RIGHTS AND POSITIVE DUTIES Ch. 7 (2008). About positive obligations under Article 14 ECHR more specifically, see, e.g., O'Connell, *supra* note 52, at 226-228; ARNARDÓTTIR, *supra* note 27, at 95-122.

⁶² Case "Relating to Certain Aspects of the Laws on the Use of Languages in Education Belgium" 4 Eur. Ct. H.R. (ser. A) (1968), p. 31 at 10.

⁶³ *Stec and Others v. United Kingdom* (GC), App. Nos. 65731/01 and 65900/01, 43 Eur. H.R. Rep. 1017 (2006).

⁶⁴ *Id.*, ¶ 51. See also, e.g., *D.H. and Others v. the Czech Republic* (GC), App. No. 57325/00, 47 Eur. H. R. Rep. 3, ¶175 (2007); and *Yordanova v. Bulgaria*, App. No. 25446/06, 24 April 2012, ¶ 129. The Court itself refers to the *Belgian Linguistics* case and to *Thlimmenos* after this quote, but in my opinion *Stec* is the first judgment in which the Court does not only explicitly permit affirmative action but actually recognizes that it can be obligatory under certain circumstances to undertake affirmative action.

⁶⁵ O'Connell, *supra* note 52, at 227-228.

⁶⁶ *Horváth and Kiss v. Hungary*, App. No. 11146/11, 29 January 2013.

⁶⁷ *Id.*, ¶ 116.

⁶⁸ *Id.*, ¶ 127.

undertaking on the part of the State to differentiate between different groups does not necessarily breach Article 14; in *Thlimmenos* the Court held that Article 14 can bring with it the obligation to accommodate difference in order not to create inequality;⁶⁹ in *Stec* the Court subsequently announced that under certain circumstances Article 14 might require positive steps on the part of the State to ensure equality; and in *Horváth and Kiss* the Court made this concrete by holding that the State has a duty to remedy inequality in certain circumstances. In other words, the positive equality duties of the CoE Member States have progressively become farther-reaching.

Another instance of a positive duty under Article 14 is the duty to investigate whether prejudiced motives played a role in cases concerning violent incidents.⁷⁰ In the Grand Chamber judgment of *Nachova and Others v. Bulgaria* (2005), the Court held that there is a substantive aspect and a procedural aspect to Article 14 when that Article is examined in conjunction with Articles 2 or 3 (the right to life and the prohibition of torture): the first going to the question whether impermissible motives (in this case racism) played a part in the case and the second going to the investigation of such motives.⁷¹ *Nachova* concerned the killing of two Roma men by a Bulgarian policeman who had also allegedly shouted “You damn Gypsies” to a bystander.⁷²

Though it has been argued that the performance of the Court in cases that concern race discrimination is still problematic,⁷³ *inter alia* because the Court is extremely hesitant to find substantive Article 14 violations,⁷⁴ it is a noteworthy development in itself that the Court has started to flesh out the prohibition of race discrimination in its legal reasoning. It took the Court a long time to start talking about racism. The most powerful indictment of this state of affairs came from Judge Bonello in his famous dissent in *Anguelova v. Bulgaria* (2002), a case about the death of a Roma boy in police custody:

Leafing through the annals of the Court, an uninformed observer would be justified to conclude that, for over fifty years democratic Europe has been exempted from any suspicion of racism,

⁶⁹ See also ARNARDÓTTIR, *supra* note 27, at 101-105.

⁷⁰ O’Connell, *supra* note 52, at 227.

⁷¹ *Nachova and Others v. Bulgaria* (GC), App. Nos. 43577/98 and 43579/98, 6 July 2005, ¶ 144-168.

⁷² There have been many cases concerning anti-Roma violence. For analysis see Mathias Möschel, *Is the European Court of Human Rights’ Case Law on Anti-Roma Violence ‘Beyond Reasonable Doubt’?*, 12 HUMAN RIGHTS LAW REVIEW 479 (2012).

⁷³ See, e.g., MARIE-BÉNÉDICTE DEMBOUR, WHO BELIEVES IN HUMAN RIGHTS? REFLECTIONS ON THE EUROPEAN CONVENTION 133-137 (2006); Marie-Bénédicte Dembour, *In the Name of the Rule of Law: The European Court of Human Rights’ Silencing of Racism*, in SILENCING HUMAN RIGHTS: CRITICAL ENGAGEMENTS WITH A CONTESTED PROJECT 184 (Gurminder K. Bhambra & Robbie Shilliam eds., 2008); and Möschel, *supra* note 72.

⁷⁴ Möschel, *supra* note 72, at 489.

intolerance or xenophobia. . . Kurds, coloureds, Muslims, Roma and others are again and again killed, tortured or maimed, but the Court is not persuaded that their race, colour, nationality or place of origin has anything to do with it. Misfortunes punctually visit disadvantaged minority groups, but only as the result of well-disposed coincidence.⁷⁵

The first time a Section of the Court held a State accountable for racial discrimination was only in the Chamber judgment of *Nachova* in 2004.⁷⁶ Since then, however, the Court has delivered numerous rulings on race discrimination – both concerning racist violence and concerning other kinds of race discrimination.⁷⁷ Many of these cases involve members of the Roma community, such as the above mentioned cases of *D.H.* and *Horváth and Kiss*. Several of these cases will be studied in the next Chapters.

The anti-Roma violence cases are also part of the last development that will be highlighted here, namely that the Court is slowly coming to see that violence can constitute a form of discrimination. So far, the most salient case in this respect is *Opuz v. Turkey* (2009), concerning domestic violence against women.⁷⁸ A mother and her daughter (the applicant) were the victim of repeated abuse and threats by the partner of the daughter. The police knew of the situation and remained passive. Eventually, the man killed the applicant's mother. The Strasbourg Court found violations of Articles 2 (the right to life), 3 (the prohibition of torture and inhuman and degrading treatment) and Article 14 in conjunction with these articles. Referring both to the indirect discrimination doctrine as developed in *D.H. and Others*, and to broader international human rights protection mechanisms such as the Convention on the Elimination of all Forms of Discrimination against Women ("CEDAW"),⁷⁹ the Court noted that "the alleged discrimination at issue was not based on the legislation *per se* but rather resulted from the general attitude of the local authorities."⁸⁰ The local authorities viewed domestic violence as a private matter, beyond their reach. The Court held that: "Bearing in mind its finding above that the general and discriminatory judicial passivity in Turkey, albeit unintentional, mainly affected women, the Court considers that the violence suffered by the applicant and her mother may be regarded as gender-based

⁷⁵ *Angelova v. Bulgaria*, App. No. 38361/97, 13 June 2002 (Bonnello J. dissenting at ¶ 3).

⁷⁶ DEMBOUR, *supra* note 73, at 133. The *Nachova* Chamber judgment (*Nachova and Others v. Bulgaria*, App. Nos., 43577/98 and 43579/98, 26 February 2004) found a violation of both the procedural and the substantive aspect of Article 14 in conjunction with Article 2. The Grand Chamber, however, rescinded the substantive violation.

⁷⁷ For an overview of the racial violence cases, see Möschel, *supra* note 72.

⁷⁸ *Opuz v. Turkey*, App. No. 33401/02, 9 June 2009, (2010) 50 Eur.H.R.Rep. 28.

⁷⁹ Adopted 18 Dec. 1979, G.A. Res. 34/180, U.N. GAOR, 34th Sess., U.N. Doc. A/34/46 (1980), 1249 U.N.T.S. 13 (entered into force 3 Sept. 1981).

⁸⁰ *Opuz v. Turkey*, App. No. 33401/02, 9 June 2009, (2010) 50 Eur.H.R.Rep. 28, ¶ 192.

violence which is a form of discrimination against women.”⁸¹ The ruling in *Opuz* has opened the door for other successful claims of discrimination in the context of domestic violence against women.⁸²

Finally, there are the two developments in the Article 14 case law that this thesis analyzes in depth, namely the adoption of an anti-stereotyping approach in several cases and the emergence of the “vulnerable groups” concept. As these developments will be amply discussed in later Chapters, they will not be explored further now.

C) Continuing Problems with Article 14 Jurisprudence

Despite these developments, numerous problems with the Court’s equality reasoning remain. This section will sketch four of these problems briefly, so as to provide background to the concrete proposals that the next chapters make as regards the concepts of stereotyping and vulnerability. These four problems are the Court’s reluctance to examine Article 14; its narrow conception of discrimination; its emphasis on intent; and the uncertainty surrounding the margin of appreciation doctrine.

The first persistent issue regarding the Court equality jurisprudence is the Court’s propensity to omit an analysis of Article 14 if it has already found another violation of the Convention. This is related to what some call the “subsidiarity” of the non-discrimination provision.⁸³ The Court often reiterates that:

Article 14 has no independent existence . . . Where a substantive Article of the Convention has been invoked both on its own and together with Article 14 and a separate breach has been found of the substantive Article, it is not generally necessary for the Court to consider the case under Article 14 also, though the position is otherwise if a clear inequality of treatment in the enjoyment of the right in question is a fundamental aspect of the case.⁸⁴

The problem is that the Court is often reluctant to acknowledge (or perhaps it is unable to see) that inequality of treatment is a fundamental aspect of a case. Take for instance *V.C. v. Slovakia* and other

⁸¹ *Id.* ¶ 200.

⁸² So far, however, these judgments have not come flooding in. The two other domestic violence cases in which the Court found a violation of Article 14 on account of gender-based discrimination are *Eremia and Others v. Moldova*, App. No. 3564/11, 28 May 2013, and *Mudric v. the Republic of Moldova*, App. No. 74839/10, 16 July 2013.

⁸³ Besson, *supra* note 53, at 157.

⁸⁴ *Chassagnou and Others v. France* (GC), App. nos. 25088/94, 28331/95, and 28443/95, 29 April 1999, ¶ 89. See also, e.g. *Airey v. Ireland* (No1) A 32 (1979); (1979-80) 2 Eur. H.R. Rep. 305, ¶ 30; and *Oršuš and Others v. Croatia* (GC), App. No. 15766/03, 52 Eur. H. R. Rep. 7, ¶ 144 (2010).

cases that the Court has recently examined concerning forced sterilizations of Roma women.⁸⁵ In *V.C.* the Court found a violation of Articles 3 and 8 (prohibition of degrading treatment and the right private and family life). It mentions in the Article 8 analysis that the issue of improper sterilizations affects mostly women from vulnerable groups and ethnic minorities and that Roma women are at particular risk.⁸⁶ The Court also observes that the physician of *V.C.* had noted in her medical file “patient is of Roma origin”.⁸⁷ And yet the Court “does not find it necessary to separately determine whether the facts of the case also gave rise to a breach of Article 14 of the Convention.”⁸⁸ Thus, the Court stops short of truly examining how the ethnic origin of the applicant and the widespread prejudice that exists about the applicant’s community prompted her forced sterilization.

V.C. is but one example: in my view, the Court regularly misses the crux of a complaint by passing over Article 14.⁸⁹ This is unfortunate both for the individual applicant who might feel that the core of her complaint is not taken seriously, and from the wider perspective of case law development.⁹⁰ If the Court does not examine the egalitarian dimension of human rights abuses, it makes a real engagement with the gap that was identified in the introduction of this Chapter – the gap between human rights rhetoric and reality, which is biggest when it comes to non-dominant people – difficult.

The second problem regarding the Court’s legal reasoning about equality is the Court’s narrow conception of what discrimination is. Rory O’Connell has rightly argued that “[t]he greatest weakness in traditional Art 14 jurisprudence has been the limited understanding of what was covered by the term

⁸⁵ *V.C. v. Slovakia*, App. No. 18968/07, 8 November 2011; and similarly *I.G. and Others v. Slovakia*, App. No. 15966/04, 13 November 2012; and *N.B. v. Slovakia*, App. No. 29518/10, 12 June 2012.

⁸⁶ *V.C. v. Slovakia*, App. No. 18968/07, 8 November 2011, ¶ 146.

⁸⁷ *Id.* ¶ 150.

⁸⁸ *Id.* ¶ 180.

⁸⁹ The list of cases in which the Court in my view wrongly decided not to examine Article 14 is long. Examples include: *P. and S. v. Poland*, App. No. 57375/08, 30 October 2012 (concerning abortion); *R.R. v. Poland*, App. No. 27617/04, 26 May 2011 (also concerning abortion); *Yordanova v. Bulgaria*, App. No. 25446/06, 24 April 2012 (regarding the forced eviction of a Roma settlement); *Van der Heijden v. Netherlands (GC)*, App. No. 42857/05, 3 April 2012 (regarding the testimonial privilege for spouses but not for unregistered partners); and *Aksu v. Turkey (GC)*, App. Nos. 4149/04; 41029/04, 15 March 2012 (about the stereotyping of Roma in government-sponsored publications). For discussion see *infra* Chapter 3.II.D.

⁹⁰ DEMBOUR, *supra* note 73, at 135. To be sure, the Court is to a large extent led by the complaints it receives: sometimes applicants do not make an allegation of discrimination in their submissions, while discrimination is arguably at issue in their case. Take for example the case of *Rantsev v. Cyprus and Russia*, concerning the death of a sex trafficking victim: as far as I can see from the text of the judgment, Mr. Rantsev did not file an Article 14 complaint whereas in my view this case needs to be framed from the perspective of discrimination against women. *Rantsev v. Cyprus and Russia*, App. no. 25965/04, 7 January 2010. For discussion see *infra* Chapter 2 Part V.B. Ultimately, however, the Court “is the master of the characterisation to be given in law to the facts of the case” so it can decide to examine an article *proprio motu*. See, e.g., *Camilleri v. Malta*, App. No. 42931/10, 22 January 2013, ¶ 33.

'discrimination'. . . it has tended to prohibit only 'direct and overt' discrimination, and has failed to reach more covert or subtle forms of discrimination."⁹¹ O'Connell is quite sanguine, however, about the impact of the recent developments that were described in the preceding section, such as the Court's recognition of indirect discrimination: he thinks these developments signal a turn to a substantive conception of equality.⁹² Though I largely agree with O'Connell, I am more cautiously optimistic, as the Court's conception of discrimination remains narrow. The first section of this part showed that the Court equates discrimination with (unjustified) differential treatment (or, as in the case of *Thlimmenos*, a failure to provide differential treatment).⁹³ Even indirect discrimination is put in the differential treatment box. Thus, the Court held in *D.H.* that: "a difference in treatment may take the form of disproportionately prejudicial effects".⁹⁴ In other words, the rulings in *Thlimmenos* and *D.H.* have done little to dislodge the differential-treatment paradigm as such.

This extremely strong focus on differential treatment is problematic because it causes the Court to reduce the whole problem of discrimination and inequality to just one of its manifestations. Discrimination can take many forms,⁹⁵ and not all of these forms can be contested through the notion of differential treatment.⁹⁶ Iris Marion Young, for example, has theorized that there are "five faces of

⁹¹ O'Connell, *supra* note 52, at 217.

⁹² See *infra* Chapter 1.III.A for discussion of various conceptions of equality, namely formal, substantive and transformative equality.

⁹³ Discrimination is defined as follows by the Court: "Discrimination for the purposes of Article 14 of the Convention means treating differently, without an objective and reasonable justification, persons in relevantly similar situations." *Aksu v. Turkey* (GC), App. Nos. 4149/04, 41029/04, 15 March 2012, ¶ 43. See *supra* Chapter 1. II.A.

⁹⁴ *D.H. and Others v. the Czech Republic* (GC), App. No. 57325/00, 47 Eur. H. R. Rep. 3, ¶184 (2007).

⁹⁵ Within human rights law, this is recognized by several specialized UN human rights conventions, such as the Convention on the Elimination of All forms of Discrimination Against Women ('CEDAW'), Adopted 18 Dec. 1979, G.A. Res. 34/180, U.N. GAOR, 34th Sess., U.N. Doc. A/34/46 (1980), 1249 U.N.T.S. 13 (entered into force 3 Sept. 1981); the Convention on the Elimination of All Forms of Racial Discrimination ('CERD'), Adopted 21 Dec. 1965, G.A. Res. 2106 (XX), U.N. GAOR, 20th Sess., U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195 (entered into force 4 Jan. 1969); and the Convention on the Rights of Persons with Disabilities ('CRPD'), Adopted 13 Dec. 2006, G.A. Res. 61/106, U.N. GAOR, 61st Sess., Agenda Item 67(b), U.N. Doc. A/RES/61/106 (2006) (entered into force 3 May 2008). These conventions all contain a definition of discrimination that goes beyond differential treatment. Article 2 CRPD, for example, states: "Discrimination on the basis of disability" means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation".

⁹⁶ See, e.g., CATHARINE MACKINNON, *Difference and Dominance: On Sex Discrimination*, in *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 32-45 (1987). MacKinnon argues that the guiding principle should be dominance rather than difference; according to her sex inequality is not a matter of difference but a matter of systematic dominance.

oppression”, namely exploitation; marginalization; powerlessness; cultural imperialism and violence.⁹⁷ The Court will not go far in contesting these kinds of harms if it persists in thinking in terms of differential treatment. Chapter Three of this thesis will argue this point specifically in relation to stereotyping: it will contend that the problem of stereotyping cannot be adequately captured under the header of differential treatment, because stereotyping can be harmful in and of itself (rather than because one group of people is stereotyped differently than another group).⁹⁸

The third problematic aspect of Article 14 reasoning, namely the Court’s occasional emphasis on discriminatory intent, is related to the first issue of the Court’s reluctance to examine Article 14. In several cases, like the forced sterilization case of *V.C. v. Slovakia*, the Court gave as a reason for not examining Article 14 that there was no evidence of a discriminatory intent on the part of the domestic authorities. The Court stated: “notwithstanding the fact that the applicant’s sterilisation without her informed consent calls for serious criticism, the objective evidence is not sufficiently strong in itself to convince the Court that it was part of an organised policy or that the hospital staff’s conduct was *intentionally* racially motivated”.⁹⁹ In other cases, the Court referred to the applicant’s failure to establish a discriminatory intent to declare the Article 14 complaint inadmissible.¹⁰⁰ Also, some separate opinions contain indications that there are individual judges at the Court who think that a finding of discriminatory intent is a prerequisite to a finding of discrimination.¹⁰¹ In contrast, in several cases of indirect discrimination, like *D.H. and Others v. the Czech Republic*, the Court has explicitly held that where legislation produces an indirect discriminatory effect it is not necessary to prove a discriminatory intent on the part of the relevant authorities.¹⁰² It appears from the jurisprudence that an intention to discriminate need not be proven in cases that concern employment, the provision of services or the educational sphere,¹⁰³ but that in cases that concern allegations of racist violence proof of a

⁹⁷ IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE*, Ch. 2 (1990).

⁹⁸ See *infra* Chapter 3.II.D. See also Chapter 2.IV.C (suggesting that the Court should drop the comparability-test and instead apply a disadvantage-test under Article 14).

⁹⁹ *V.C. v. Slovakia*, App. No. 18968/07, 8 November 2011, ¶ 177 (emphasis added). See also *I.G. and Others v. Slovakia*, App. No. 15966/04, 13 November 2012, ¶ 165; and *N.B. v. Slovakia*, App. No. 29518/10, 12 June 2012, ¶ 121 (both also about the involuntary sterilization of Roma women). Other cases where the Court refers to intent include *Aksu v. Turkey* (GC), App. Nos. 4149/04; 41029/04, 15 March 2012, ¶ 45.

¹⁰⁰ See, e.g., *A v. Croatia*, App. No. 55164/08, 14 October 2010, ¶ 101 (concerning domestic violence against women).

¹⁰¹ See, e.g., *Genderdoc-M. v. Moldova*, App. No. 9106/06, 12 June 2012 (Myjer, J., concurring); *Valiulienė v. Lithuania*, App. No. 33234/07, 26 March 2013 (Pinto de Albuquerque, J. concurring at note 19).

¹⁰² See, e.g., *D.H. and Others v. the Czech Republic* (GC), App. No. 57325/00, 47 Eur. H. R. Rep. 3, ¶ 184 and 194 (2007); *Horváth and Kiss v. Hungary*, App. No. 11146/11, 29 January 2013, ¶ 106.

¹⁰³ *Id.*

discriminatory intent is vital in order to obtain a finding of a substantive Article 14 violation.¹⁰⁴ To be sure, this seems to be an area of the Strasbourg jurisprudence that is rapidly developing. At the moment the Court's approach to intent is ambiguous, however, as the cases of *V.C.* on the one hand and *D.H.* on the other hand show.

What is wrong with the focus on intent? The paradoxical result of the Strasbourg jurisprudence as it stands is that the more violent discrimination is, the less likely the Court is to recognize it as discrimination. Moreover, as American equal protection law scholars have shown, discrimination often does *not* occur by intent, but through unconscious stereotyping.¹⁰⁵ This is corroborated by the work of social psychologists. For present purposes this finding is important: as stereotyping often occurs unconsciously, the Strasbourg Court will not be able to respond adequately to stereotypes if it persists in focusing on the presence of a discriminatory intent.¹⁰⁶

The last enduring difficulty with the Court's equality jurisprudence which will be discussed in this section concerns the margin of appreciation, and more specifically the 'very weighty reasons'-doctrine. It is unclear what the "unifying principle[s]"¹⁰⁷ is/are that determine whether a discrimination ground requires very weighty reasons or not.¹⁰⁸ Up to a few years ago, the only consideration that the Court regularly mentioned was the existence of a *European consensus*: if a State failed to meet a common European standard, its margin of appreciation would be narrower and the State would be obliged to justify the distinction with very weighty reasons.¹⁰⁹ The Court still relies on the consensus-argument to

¹⁰⁴ *Nachova and Others v. Bulgaria* (GC), App. Nos. 43577/98 and 43579/98, 6 July 2005, ¶ 157.

¹⁰⁵ See, e.g., Charles R. Lawrence III, *The Id the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STANFORD LAW REVIEW 317 (1987); and Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STANFORD LAW REVIEW 1161 (1995).

¹⁰⁶ See *infra* Chapter 6.II.E.

¹⁰⁷ SANDRA FREDMAN, DISCRIMINATION LAW 130 (2nd ed. 2011).

¹⁰⁸ See generally, e.g., J.H. GERARDS, RECHTERLIJKE TOETSING AAN HET GELIJKHEIDSBEGINSEL. EEN RECHTSVERGELIJKEND ONDERZOEK NAAR EEN ALGEMEEN TOETSINGSMODEL 199 (2002).

¹⁰⁹ GERARDS, *supra* note 108, at 206. See for an example of how the Court uses the consensus argument to delineate a protected group, e.g., *Abdulaziz, Cabales, and Balkandali v. United Kingdom* A 94 (1985); 7 Eur. H.R. Rep. 471, ¶ 78. In Article 14 analysis, however, consensus does not only serve to determine which groups require special protection; the Court also uses consensus to widen or restrict the scope of the application of the Convention principles. In that sense, see for example *Schalk and Kopf v. Austria*, App. No. 30141/04, 24 June 2010, ¶ 105-106. Moreover, the consensus argument transcends the Article 14 case law and recurs often in the Court's legal reasoning. See generally, e.g., Eyal Benvenisti, *Margin of Appreciation, Consensus and Universal Standards*, 31 NEW YORK JOURNAL OF INTERNATIONAL LAW AND POLITICS 843 (1998- 1999); Kanstantsin Dzehtsiarou, *European Consensus and the Evolutive Interpretation of the European Convention on Human Rights*, 12 GERMAN LAW JOURNAL 1730 (2011); and LETSAS, *supra* note 11, at 123-126.

help “delineate protected groups”,¹¹⁰ but the Court has also elaborated other principles now. It has mentioned *immutability*, *group vulnerability due to a history of discrimination*, and *importance for individual self-fulfillment* as other criteria.¹¹¹ The immutability criterion means that if a trait is based on personal choice rather than on an immutable characteristic, then distinctions on the basis of this trait will not require a very weighty justification. The Court has employed this reasoning in a 2011 case concerning immigration status; *Bah v. UK*.¹¹² The vulnerable group argument, on the other hand, was developed in cases concerning Roma and persons with a disability, and is thoroughly explored in Chapter Four. The self-fulfillment criterion, lastly, stems from a freedom of religion case. In *Vojnity v. Hungary* (2013), the Court mentioned “the importance of the rights enshrined in Article 9 [the right to freedom of religion] of the Convention in guaranteeing the *individual’s self-fulfillment*” as the reason for assigning strict scrutiny to discrimination on the basis of religion.¹¹³

It is not in itself problematic that several factors can intensify the Court’s scrutiny. Indeed, this enables a dynamic non-discrimination case law that is capable of responding to changing circumstances.¹¹⁴ There are tensions between these different factors, however, which the Court does not seem to acknowledge. In the case of *Bah v. UK*, for example, the Court uses the immutability-argument to determine that the scrutiny is *not* strict.¹¹⁵ If it had used the group vulnerability argument, however, it might well have determined that immigration status is a ground that *does* require strict scrutiny. Furthermore, as Chapter Two will argue, the Court is not consistent in its application of the very weighty reason doctrine: sometimes the Court pays lip-service to the notion of very weighty reasons, while it in practice carries out a more lenient scrutiny.¹¹⁶ For these reasons, the Article 14 case law is somewhat arbitrary and inconsistent.

Now that the Court’s approach to the prohibition of discrimination has been sketched, as well as the recent developments in Article 14 jurisprudence that signal a more important role for that provision in the Court’s work, and the problems that still remain with the Court reasoning about non-

¹¹⁰ FREDMAN, *supra* note 107, at 137. See recently, e.g., *Kiyutin v. Russia*, App. No. 2700/10, 53 Eur. H.R. Rep. 26 ¶ 65 (2011).

¹¹¹ *Bah v. United Kingdom*, App. No. 56328/07, 27 September 2011, ¶ 47 (immutability); *Alajos Kiss v. Hungary*, App. No. 38832/06, 20 May 2010, ¶ 42 (history of disadvantage); and *Kiyutin v. Russia*, App. No. 2700/10, 53 Eur. H.R. Rep. 26 ¶ 63 (2011) (history of disadvantage).

¹¹² *Bah v. United Kingdom*, App. No. 56328/07, 27 September 2011, ¶ 47.

¹¹³ *Vojnity v. Hungary*, App. No. 29617/07, 12 February 2013, ¶ 36 (italics are mine).

¹¹⁴ FREDMAN, *supra* note 107, at 139.

¹¹⁵ *Bah v. United Kingdom*, App. No. 56328/07, 27 September 2011, ¶ 47.

¹¹⁶ See *infra* Chapter 2.IV.C.

discrimination, it is time to introduce the three concepts that are at the heart of the analysis of this PhD thesis.

III. Core Concepts: Equality, Stereotyping and Vulnerability

To a significant extent, the originality of this thesis lies in the concepts it employs. To my knowledge, I am the first commentator to analyze and critique the case law of the ECtHR through the lens of “stereotyping”. Similarly, to my knowledge, Lourdes Peroni and I are the first to use “vulnerability” as a concept through which to study the jurisprudence of the ECtHR.

This part of the chapter will summarize the central tenets of the three concepts that are at the core of this dissertation: equality (section A), stereotyping (section B) and vulnerability (section C). These concepts are all deeply contested in legal as well as non-legal literature. This part is confined, therefore, to setting out my understanding of these concepts; the critical exploration of other interpretations is left to the next chapters.

A) Equality: formal, substantive, and transformative¹¹⁷

This study distinguishes between three legal conceptions of equality: formal, substantive and transformative.¹¹⁸ *Formal equality* is usually understood as equality as sameness: it dictates identical treatment (treating likes alike).¹¹⁹ Formal equality demands that no distinctions can be made on the basis of certain traits, such as gender, race, sexual orientation, religion etc., without sufficient justification. One of the hallmarks of a formal equality approach is its focus on comparability: a formal equality analysis demands a comparator who does not share the trait in question (such as a specific sex or sexual orientation) and who was treated differently than the complainant.¹²⁰ Another hallmark of a formalist approach to equality is that it is decontextualized; it tends to employ disembodied reasoning

¹¹⁷ This sub-section draws on and partly reproduces a paper that is not part of this PhD, namely Alexandra Timmer, *From Inclusion to Transformation: Rewriting Konstantin Markin v. Russia*, in DIVERSITY AND EUROPEAN HUMAN RIGHTS: REWRITING JUDGMENTS OF THE ECHR (Eva Brems, ed., 2012), p. 148-170.

¹¹⁸ See especially *infra* Chapter 2.II.

¹¹⁹ See, e.g., ARNARDÓTTIR, *supra* note 27, at 21; and FREDMAN, *supra* note 107, at 8-14.

¹²⁰ FREDMAN, *supra* note 107, at 10-11. Feminist legal literature has extensively critiqued the supposedly neutral comparator-heuristic; see, e.g., MACKINNON, *supra* note 96; Denise Réaume, *Comparing Theories of Sex Discrimination: The Role of Comparison*, 25 OXFORD JOURNAL OF LEGAL STUDIES 547 (2005).

and it privileges “abstract principles over material facts”.¹²¹ A recent judgment that epitomizes a formal equality approach is the already mentioned case of *Bah v. UK*. Ms. Bah came from Sierra Leone and claimed asylum in the UK. This request was refused, but she was exceptionally granted leave to remain in the UK indefinitely. Her teenage son was allowed to join her there, on the condition that he would not have recourse to public funds. Ms. Bah was renting a room in a private home, but her landlord asked her to leave when her son arrived because he did not want to house the son as well. Usually, unintentional homeless persons with minor children would have priority access to social housing. Ms. Bah, however, did not qualify as being in “priority need” because of her son’s immigration status.¹²² She complained to the Strasbourg Court that this constitutes discrimination. The response of the Court sounds formulaic: “only where there is differential treatment, based on an identifiable characteristic or “status”, of persons in analogous or relevantly similar positions, can there be discrimination.”¹²³ And then the Court immediately turns the analysis to “the question of who is the appropriate comparator to this applicant”.¹²⁴

The problems with formal equality have been the subject of much theorizing by critical legal scholars over the past four decades.¹²⁵ Briefly, a central objection to the formal equality approach is that, with its abstract and decontextualized analysis, it is blind to pre-existing disadvantage and cannot do justice to the messy reality in which people find themselves. Moreover, a formal equality approach is thought to favor dominant groups,¹²⁶ because it takes as its point of reference the experience of dominant groups.¹²⁷ So, for example, formal equality will bring women equality only as far as they are the same as men, disabled people will only be protected to the extent that they are the same as non-

¹²¹ Sheila McIntyre, Answering the Siren Call of Abstract Formalism with the Subjects and Verbs of Domination, in *MAKING EQUALITY RIGHTS REAL, MAKING EQUALITY RIGHTS REAL: SECURING SUBSTANTIVE EQUALITY UNDER THE CHARTER 99*, 105 (Fay Faraday, Margaret Denike & M. Kate Stephenson eds., 2009). See also, e.g., Martha Nussbaum, *Foreword: Constitutions and Capabilities: “Perception” Against Lofty Formalism*, 121 *HARVARD LAW REVIEW* 4 (2007).

¹²² *Bah v. United Kingdom*, App. No. 56328/07, 27 September 2011, ¶ 7.

¹²³ *Id.* ¶ 41.

¹²⁴ *Id.* In its judgment in *Bah* the Court relies on the immutability criterion (see ¶ 45-47; for discussion see *supra*), which can also be seen as part and parcel of a formalist approach to equality. For further discussion see Lourdes Peroni & Alexandra Timmer, *Bah v. UK: on immigration, discrimination and worrisome reasoning*, STRASBOURG OBSERVERS, 12 October 2011, available at: <http://strasbourgobservers.com/2011/10/12/bah-v-uk-on-immigration-discrimination-and-worrisome-reasoning/>.

¹²⁵ Particularly insightful critiques include, e.g., Owen Fiss, *Groups and the Equal Protection Clause*, 5 *PHILOSOPHY & PUBLIC AFFAIRS* 107 (1976); MACKINNON, *supra* note 96; FREDMAN, *supra* note 107, at 1-37.

¹²⁶ See, e.g., McIntyre, *supra* note 121, at 106 (“formal equality thinking . . . is overwhelmingly the ideology of dominant groups, not least because its premises and outcomes correlate perfectly with the interests of members of dominant groups.”).

¹²⁷ See, e.g., MACKINNON, *supra* note 96; and FREDMAN, *supra* note 107, at 11-12.

disabled people, and religious minorities will only find protection to the extent that their claims are in line with the dominant religion. Many feminist legal theorists attribute formal equality thinking to liberal ideology and liberal notions of the state and of personhood.¹²⁸ Formal equality “is underpinned by an idealized version of the liberal individual: autonomous, self-interested and self-determined.”¹²⁹ The ideal of the liberal individual making free choices is also behind the judgment in *Bah*. The Court emphasizes that the applicant “chose to have her son join her in the United Kingdom” and that as she was “in full awareness of the condition attached to his leave to enter, the applicant accepted this condition and effectively agreed not to have recourse to public funds in order to support her son.”¹³⁰ The Court reasoning does not consider how Ms. Bah found herself in a very precarious situation; having to take care of a 13 year old child by herself, in a new country, while she was being threatened by homelessness. Nor does the Court reflect on how Ms. Bah’s situation affected her choices. Instead, the judgment reduces Ms. Bah’s case to an abstract debate about proper comparators. This is not to say that a formal equality approach does not serve a purpose. Formal equality provides a clear analytical tool and, moreover, it can count on broad support within liberal communities. In the past the Court has booked important successes on the non-discrimination terrain while employing a formal equality approach.¹³¹ This approach has let the Court to bring previously unprotected groups – such as illegitimate children¹³² – within the protective reach of the Convention. When discrimination is the result of an obvious difference in treatment between a protected group and another group, then formal equality is an effective tool.

Substantive equality is a more diffuse concept, which has generated many different interpretations. In contrast to formal equality, it seeks to understand people in their social and historical contexts. “Unlike formal equality”, Sandra Fredman has noted, “substantive equality is expressly asymmetric . . . [t]hus instead of aiming to treat everyone alike, regardless of status, substantive equality focuses on the group which has suffered disadvantage”.¹³³ From this perspective it is not problematic to focus on women rather than men, gays rather than heterosexuals, minorities rather than majorities:

¹²⁸ ARNARDÓTTIR, *supra* note 27, at 22. See, e.g., Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1 (2008-2009).

¹²⁹ Margot Young, *Unequal to the Task: ‘Kapp’ing the Substantive Potential of Section 15*, 50 SUPREME COURT LAW REVIEW 183, 190-191 (2010).

¹³⁰ *Bah v. United Kingdom*, App. No. 56328/07, 27 September 2011, ¶ 47 and 50.

¹³¹ See generally about the virtues of formal equality, e.g., ROBIN L. WEST, *REIMAGINING JUSTICE: PROGRESSIVE INTERPRETATIONS OF FORMAL EQUALITY, RIGHTS, AND THE RULE OF LAW*, Ch. 4 (2003); and Young, *supra* note 129, at 192-193.

¹³² *Marckx v. Belgium*, Series A, No. 31, 27 April 1979.

¹³³ FREDMAN, *supra* note 107, at 26.

indeed, the aim of a substantive equality approach is the *de facto* equality of disadvantaged groups. This *de facto* equality is multi-dimensional:¹³⁴ at a minimum, it refers both to equality in the distribution of material goods and resources, and to equality in terms of social recognition.¹³⁵

Many of the developments that were described in the preceding part in relation to cases like *Thlimmenos, D.H.* and *Horváth and Kiss* show that the Court is moving towards a more substantive conception of equality.¹³⁶ Especially the Court's recognition of indirect discrimination and its expanding of positive obligations to promote equality can do much to improve the *de facto* position of disadvantaged groups. Chapter Four will argue that also the Court's adoption of the vulnerable group concept signals a turn to substantive equality.¹³⁷ The limitation of the substantive equality approach, at least as that approach has been sketched here, is that it does not necessarily address the root causes of discrimination and inequality.¹³⁸ Substantive equality, in the version that is presented here, tends to address the symptoms (of inequality) but not the disease itself.

That is where *equality as transformation* enters the debate. Equality as transformation is aimed at transforming the underlying causes of discrimination and inequality. Nancy Fraser describes this as "restructuring the underlying generative framework".¹³⁹ In other words, the term transformative equality "denote[s] change of a fundamental and far-reaching nature".¹⁴⁰ To flesh out what this entails in the context of judicial review, it is helpful to contrast transformation with inclusion. A justice project that aims for transformation is more radical than a justice project that aims for inclusion. South African scholars Elsje Bonthuys and Catherine Albertyn suggest that an inclusionary judgment is one that "expands the groups of people who can claim legal protection ... [but] leaves the legal and social status

¹³⁴ See, e.g., ARNARDÓTTIR, *supra* note 27, at 24-29; Susanne Baer, *A closer look at law: human rights as multi-level sites of struggles over multi-dimensional equality*, 6 UTRICHT LAW REVIEW 56 (2010); and FREDMAN, *supra* note 107, at 25-33.

¹³⁵ I have the work of Nancy Fraser in mind here, which distinguishes between the distribution and recognition aspects of justice. See, e.g., NANCY FRASER, *JUSTICE INTERRUPTUS: CRITICAL REFLECTIONS ON THE 'POSTSOCIALIST' CONDITION* (1997); Nancy Fraser, *Rethinking Recognition*, 3 NEW LEFT REVIEW 107 (May-June 2000); and NANCY FRASER & AXEL HONNETH, *REDISTRIBUTION OR RECOGNITION? A POLITICAL-PHILOSOPHICAL EXCHANGE* (2003). Fraser's distinction between distribution and recognition plays a role in both my work on stereotyping and my work on vulnerable groups. See *infra* Chapter 2.III, and Chapter 4.III.B.

¹³⁶ See *supra* Chapter 1.II.B.

¹³⁷ See *infra* Chapter 4.IV.

¹³⁸ Some other scholars conceptualize substantive equality in a more expansive way however, which does take the need to address the root causes of inequality on board. See *infra* text accompanying notes 154-155.

¹³⁹ FRASER, *JUSTICE INTERRUPTUS*, *supra* note 135, at 23 (By transformative remedies [. . .] I mean remedies aimed at correcting inequitable outcomes precisely by restructuring the underlying generative framework.').

¹⁴⁰ Andrew Byrnes, *Article 1 CEDAW*, in *THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN: A COMMENTARY* 51, 56 (Marsha A. Freeman, Christine Chinkin & Beate Rudolf eds., 2012).

quo largely intact”, whereas transformative jurisprudence would locate disadvantage within systemic inequalities “and thus dislodge the underlying norms and structures that create and reinforce a rigid and hierarchical status quo.”¹⁴¹ Equality scholars often center their efforts on inclusion; typically, this means that they claim that the judiciary should protect a group which previously lacked specific protection. This dissertation, however, will argue that the ECtHR should now direct its energies towards developing transformative equality.¹⁴² Only by addressing and contesting the underlying causes of discrimination and inequality will the Court be able to do something about the gap between human rights reality and rhetoric as regards non-dominant groups.

My focus on and understanding of equality as transformation owes a great deal to the CEDAW Committee and its scholars.¹⁴³ Even though the CEDAW Committee exclusively addresses gender equality, its views are extremely helpful in conceptualizing equality more generally.¹⁴⁴ The CEDAW Committee has provided a clear formulation of its views on gender equality in *General Recommendation No. 25*.¹⁴⁵ In this Recommendation the Committee observes that “three obligations are central to States parties’ efforts to eliminate discrimination against women”.¹⁴⁶ These three obligations are to: (1) ensure that there is no direct or indirect discrimination against women; (2) improve the *de facto* position of women, and (3) address prevailing gender relations and the persistence of gender-based stereotypes.¹⁴⁷ These obligations broadly correspond to formal equality, substantive equality, and transformative equality respectively.¹⁴⁸ About the third, transformative, obligation the CEDAW Committee has said:

¹⁴¹ Elsje Bonthuys, *Institutional Openness and Resistance to Feminist Arguments: the Example of the South African Constitutional Court*, 20 CANADIAN JOURNAL OF WOMAN AND LAW 1, 35 (2008), quoting Catherine Albertyn, *Defending and Securing Rights through Law: Feminism, Law and the Courts in South Africa*, 32 POLITIKON 217 (2005). The notion of transformative equality is particularly emphasized in South African scholarship and jurisprudence. See, e.g., *id.*; and Cathi Albertyn & Beth Goldblatt, *Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality*, 14 SOUTH AFRICAN JOURNAL ON HUMAN RIGHTS 248 (1998).

¹⁴² See *infra* Chapter 2.II.

¹⁴³ See especially Byrnes, *supra* note 140, at 53-56; REBECCA J. COOK & SIMONE CUSACK, GENDER STEREOTYPING: TRANSNATIONAL LEGAL PERSPECTIVES (2010); Sandra Fredman, *Beyond the Dichotomy of Formal and Substantive Equality: Towards a New Definition of Equal Rights*, in TEMPORARY SPECIAL MEASURES: ACCELERATING DE FACTO EQUALITY OF WOMEN UNDER ARTICLE 4(1) UN CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN 111 (Ineke Boerefijn et al. eds., 2003); Rikki Holtmaat, *Article 5 CEDAW*, in THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN: A COMMENTARY 141 (Marsha A. Freeman, Christine Chinkin & Beate Rudolf eds., 2012).

¹⁴⁴ In a paper that does not form part of this PhD I have argued that the ECtHR would do well to better integrate the insights of the CEDAW Committee in its legal reasoning. See Timmer, *supra* note 117, at 151-156.

¹⁴⁵ CEDAW Committee, *General Recommendation No. 25: Article 4, Paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on Temporary Special Measures*, A/59/38 (2004).

¹⁴⁶ *Id.*, at para. 6.

¹⁴⁷ *Id.*, at para. 7.

¹⁴⁸ RIKKI HOLTMAAT & JONNEKE NABER, WOMEN’S HUMAN RIGHTS AND CULTURE: FROM DEADLOCK TO DIALOGUE 25 (2011).

The position of women will not be improved as long as the underlying causes of discrimination against women, and of their inequality, are not effectively addressed. The lives of women and men must be considered in a contextual way, and measures adopted towards a real transformation of opportunities, institutions and systems so that they are no longer grounded in historically determined male paradigms of power and life patterns.¹⁴⁹

It is submitted that this insight does not only hold true for women, but also for other non-dominant groups:¹⁵⁰ their position will not be improved as long as the underlying causes of discrimination and inequality are not effectively addressed. Likewise, not just male paradigms of power and life patterns need to be challenged, but all historically determined dominant paradigms of power.

As Chapter Two explicates, the obligation to transform the underlying structures that generate gender inequality is grounded in Article 5 CEDAW.¹⁵¹ Section A of this provision provides that States ought to take all appropriate measures:

To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.

This provision puts the focus on stereotypes as one of the underlying causes of (gender) discrimination.¹⁵² Contesting stereotypes is, in other words, an important strategy in achieving transformative equality. As Chapters Two and Three will explore in depth, the recent Strasbourg case law shows some promising signs that the ECtHR is prepared to address stereotypes vigorously. Especially the Grand Chamber judgment of *Konstantin Markin v. Russia* (2012), concerning parental leave for a military serviceman, holds out hope that an anti-stereotyping approach can bring the Court nearer to equality as transformation.¹⁵³

¹⁴⁹ CEDAW, General Recommendation 25, *supra* note 145, at para. 10.

¹⁵⁰ See *infra* Chapter 1.V.C for more discussion about the connection between gender analysis and the analysis of non-dominant groups more generally.

¹⁵¹ For extensive analysis see Holtmaat, *supra* note 143.

¹⁵² *Id.* at 144.

¹⁵³ *Konstantin Markin v. Russia* (GC), App. No. 30078/06, 56 Eur. H.R. Rep. 8 (2013). For discussion see *infra* Chapter 3.II.

Before the next section can delve deeper into the concept of stereotyping, it should be noted that in the legal literature the concepts of substantive and transformative equality frequently overlap.¹⁵⁴ Most scholars only make a distinction between formal and substantive equality; they would rank what is described as transformative equality here under the header of substantive equality.¹⁵⁵ I find the term “transformative equality” useful, however, to indicate that contesting the root causes of inequality is a crucial element of equality analysis. Currently, the biggest challenge for the Court’s Article 14 jurisprudence is to develop a conception of equality as transformation. That is not to say that the Court should let go of formal and substantive equality; all three conceptions of equality serve their purpose and should therefore co-exist. And, in fact, this is already somewhat the case in the Strasbourg jurisprudence. As this discussion already showed and Chapter Two will further explore, these conceptions of equality are nowadays all three reflected in the Strasbourg Court’s reasoning (though formal equality predominates). Indeed, a single judgment can contain elements of several of these approaches: a judgment can contain both formal and substantive, or substantive and transformative equality reasoning. But equality as transformation is where the frontier of the legal reasoning lies, and where, this thesis posits, the Court should now direct its energies.

B) Stereotyping

Transformative equality leads to the topic of stereotypes. The rationale for assigning such a central place to the concept of stereotyping in this dissertation is essentially twofold. On a normative level, the concept captures what the ECtHR should now be addressing: the underlying frameworks which generate persistent inequality in Europe. On a more strategic level, the concept seems particularly fit for this purpose because it is already present in human rights law (most prominently in the work of the CEDAW Committee¹⁵⁶) and in equal protection law of some national jurisdictions (notably the U.S. and Canada,

¹⁵⁴ Byrnes, *supra* note 140, at 56.

¹⁵⁵ In the context of the ECHR case law, *see, e.g.*, ARNARDÓTTIR, *supra* note 27, at 18-20 (Arnardóttir distinguishes two types of substantive equality however). *See also* McIntyre, *supra* note 121, at 103 (who speaks of “the substantively transformative implications of embracing a substantive equality approach”); Albertyn & Goldblatt, *supra* note 141, at 249.

¹⁵⁶ Apart from CEDAW, *see also, e.g.*, Articles 6(b) and 8(b), Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women 1994 (Convention of Belém do Pará), (1994) 33 ILM 1534; Articles 2(2), and 4(d), Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa 2003, OAU DOC CAB/LEG/66.6; Article 8(1)b, Convention on the Rights of Persons with Disabilities 2006, GA Res 61/106 Annex 1, A/61/49 (2006).

which is explored in Chapter Three). The present section will draw on social psychology literature to gain a better understanding of stereotypes.

This dissertation deploys a neutral definition of stereotypes, namely that stereotypes are beliefs about groups of people. Stated more elaborately, stereotypes are preconceptions about the characteristics, roles and attributes of groups of people.¹⁵⁷ These characteristics, roles or attributes are then attributed to all individual members of the group in question, without regard to the individual's actual situation.¹⁵⁸

First of all, stereotypes are held at the individual level. A lot of psychological research has focused on how stereotypes work at a cognitive level, or, in other words, on how they are mentally represented.¹⁵⁹ Stereotypes are stored in our memory in the form of cognitive representations.¹⁶⁰ Stereotypes can be triggered automatically when we come into contact with members of the stereotyped group. This plays out at an unconscious level, without awareness or intention.¹⁶¹ Studies have also shown that it is quite possible that people explicitly disavow a certain stereotype, while at the same time their behavior is implicitly guided by it: in these cases there is a "conflict between explicit beliefs and implicit stereotype associations."¹⁶²

Stereotypes are held individually, but at the same time they are also undoubtedly held collectively: they are a social/cultural phenomenon.¹⁶³ At a fundamental level stereotypes are social norms; the extent to which people hold and express stereotypes depends on what they deem fit within their social environment.¹⁶⁴ "[M]any (perhaps most) of our stereotypes are in fact widely held and

¹⁵⁷ Cf. the definition of a stereotype of Rebecca Cook and Simone Cusack: "a generalized view or preconception of attributes or characteristics possessed by, or the roles that should be performed by, members of a particular group". COOK & CUSACK, *supra* note 143, at 9.

¹⁵⁸ *Id.*

¹⁵⁹ See, e.g., Charles Stangor & Mark Schaller, *Stereotypes as Individual and Collective Representations*, in STEREOTYPES AND PREJUDICE: ESSENTIAL READINGS 64, 65-68 (Charles Stangor ed., 2000).

¹⁶⁰ Charles Stangor, *Volume Overview*, in STEREOTYPES AND PREJUDICE: ESSENTIAL READINGS 1, 6-7 (Charles Stangor ed., 2000).

¹⁶¹ See, e.g., Patricia G. Devine & Lindsay B. Sharp, *Automaticity and Control in Stereotyping and Prejudice*, in HANDBOOK OF PREJUDICE, STEREOTYPING AND DISCRIMINATION 61, 62 (Todd D. Nelson ed., 2009); and Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCHOLOGICAL REVIEW 4 (1995).

¹⁶² David D. Amodio & Matthew D. Lieberman, *Pictures in Our Heads: Contributions of fMRI to the Study of Prejudice and Stereotyping*, in HANDBOOK OF PREJUDICE, STEREOTYPING AND DISCRIMINATION 347, 349 (Todd D. Nelson ed., 2009). See also Greenwald & Banaji, *supra* note 161, at 15.

¹⁶³ Stangor & Schaller, *supra* note 159.

¹⁶⁴ Charles Stangor, *The Study of Stereotyping, Prejudice and Discrimination within Social Psychology: A Quick History of Theory and Research*, in HANDBOOK OF PREJUDICE, STEREOTYPING AND DISCRIMINATION 1, 4 (Todd D. Nelson ed., 2009).

culturally sanctioned.”¹⁶⁵ The content of these stereotypes is contingent on history.¹⁶⁶ There is a vast body of fascinating historical research into the development of specific stereotypical prototypes, such as “the sensual Oriental woman” and “the greedy Jew”.¹⁶⁷

People stereotype for a myriad of reasons. A first or “epistemic” function of stereotypes is to understand and simplify our social environment.¹⁶⁸ This is true for both the individual and the collective level of stereotypes.¹⁶⁹ Stereotypes can both “supplement an information-impovertised environment” and “reduce the complexity of an information-rich environment.”¹⁷⁰ Either way, stereotypes provide predictability.¹⁷¹ A second function of stereotypes concerns our feelings about ourselves. Stereotyping is a “self-image-maintenance” strategy.¹⁷² In order to function properly humans need to feel good both about themselves and about the groups they belong too.¹⁷³ We routinely judge people from our own groups (“in-groups”) more favorably than members from other groups (“out-groups”), this is known as “in-group favoritism”.¹⁷⁴ Another way of putting in-group favoritism is that it allows us to differentiate between “us” and “them”. Thus, one of the things that stereotypes do is that they assign difference.¹⁷⁵ Assigning difference often happens with the purpose of defining our own identity,¹⁷⁶ by setting our own identity up against a less worthy “Other”.¹⁷⁷ This defining of the “self” in opposition to “others” happens both at the individual and at the collective level.¹⁷⁸

As to the content of stereotypes, they can be positive, negative and ambivalent.¹⁷⁹ It is a misconception to think that stereotypes are necessarily negative or inaccurate.¹⁸⁰ They are primarily

¹⁶⁵ DAVID J. SCHNEIDER, *THE PSYCHOLOGY OF STEREOTYPING* 322 (2004).

¹⁶⁶ SANDER L. GILMAN, *DIFFERENCE AND PATHOLOGY: STEREOTYPES OF SEXUALITY, RACE AND MADNESS* 20 (1985).

¹⁶⁷ See, e.g., *id.*; and EDWARD SAID, *ORIENTALISM* (1978).

¹⁶⁸ Stangor & Schaller, *supra* note 159, at 73-75.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 74.

¹⁷¹ COOK & CUSACK, *supra* note 143, at 14-15.

¹⁷² Steven Fein & Steven J. Spencer, *Prejudice as Self-Image Maintenance: Affirming the Self Through Derogating Others*, in *STEREOTYPES AND PREJUDICE: ESSENTIAL READINGS* 172, 186 (Charles Stangor ed., 2000).

¹⁷³ Stangor & Schaller, *supra* note 159, at 75.

¹⁷⁴ Stangor, *supra* note 160, at 4. See generally, e.g., SCHNEIDER, *supra* note 165, at 229-265.

¹⁷⁵ COOK & CUSACK, *supra* note 143, at 16-18.

¹⁷⁶ This is called “social identity theory”. See, e.g., SCHNEIDER, *supra* note 165, at 233.

¹⁷⁷ A lot of literature exists about “otherizing”. Famous treatises about “the Other” include SIMONE DE BEAUVOIR, *THE SECOND SEX* (1949); and SAID, *supra* note 167.

¹⁷⁸ Zanita E. Fenton, *Domestic Violence in Black and White: Racialized Gender Stereotypes in Gender Violence*, 8 *COLUMBIA JOURNAL OF GENDER AND LAW* 1, 17 (1998-1999).

¹⁷⁹ See, e.g., Susan T. Fiske et al., *A Model of (Often Mixed) Stereotype Content: Competence and Warmth Respectively Follow from Perceived Status and Competition*, 82 *JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY* 878 (2002); Cuddy et al., *Stereotype content model across cultures: Towards universal similarities and some differences*, 48 *BRITISH JOURNAL OF SOCIAL PSYCHOLOGY* 1 (2009).

negative, however: when people are asked to list stereotypes, they come up with many more negative than positive ones.¹⁸¹ Susan Fiske and her colleagues have developed the “stereotype content model”.¹⁸² They argue that when people encounter members from out-groups, they ask themselves two questions: “Do they intend to harm me; and are they capable of harming me?”¹⁸³ These questions correspond to perceived warmth and competence, which are – according to these researchers – the two primary dimensions of stereotype content. This model, which suggests that people are primarily worried about the harm that can happen to them, accords with what lawyer Zanita Fenton has claimed: “Social power, its acquisition and maintenance, is the driving force behind the formulation of stereotypes.”¹⁸⁴

Even though this dissertation deploys a neutral formulation of stereotypes, this is not to say that their effects are neutral; far from it. Indeed, the reason why scholars across disciplines are so preoccupied with stereotypes is that they are closely related to a variety of social ills. Stereotyping is a big part of the complicated dynamic that pins some groups to “the underside of society” and keeps them there.¹⁸⁵ A central claim of this thesis is that stereotyping reinforces discrimination and inequality and that therefore the Strasbourg Court should formulate a fitting response to stereotypes. Chapter Two will argue that the injurious effects of stereotyping are felt in three realms; namely in the realms of (social) recognition, (material) distribution, and individual psychological well-being.¹⁸⁶ What is more, it would be a mistake to think that only negative stereotypes – of the variety “overweight people are lazy” or “Roma are thieves” – have such negative consequences. Positive stereotypes can be malignant too.¹⁸⁷ Salient examples are the many benevolent yet patronizing stereotypes about women: when women are held to be nurturing, warm and caring, this serves to justify a system of patriarchy where men perform the leading roles and women the supportive ones.

¹⁸⁰ This misconception is rooted in the earliest articulations of stereotype by social psychologists. See GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* 1954; Stangor, *supra* note 164, at 2.

¹⁸¹ Stangor, *supra* note 164, at 2.

¹⁸² See *supra* note 179.

¹⁸³ Cuddy e.a., *supra* note 179, at 3.

¹⁸⁴ Fenton, *supra* note 178, at 15.

¹⁸⁵ Patricia Williams quoted in McIntyre; McIntyre, *supra* note 121, at 108 (“Black individuality is subsumed in a social circumstance – an idea, a stereotype – that pins us to the underside of this society and keeps us there, out of sight/out of mind, out of the knowledge of mind which is law.”).

¹⁸⁶ See *infra* Chapter 2.III.

¹⁸⁷ See, e.g., Peter Glick & Susan T. Fiske, *An ambivalent alliance: Hostile and benevolent sexism as complementary justifications for gender inequality*, 56 *AMERICAN PSYCHOLOGIST* 109 (2001); and John T. Jost & Aaron C. Kay, *Exposure to benevolent sexism and complementary gender stereotypes: Consequences for specific and diffuse forms of system justification*, 88 *JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY* 498 (2005).

Stereotype is narrowly linked with a number of other concepts such as prejudice, stigma and discrimination. In social psychology literature, stereotypes, prejudice and discrimination are often examined together.¹⁸⁸ This literature commonly describes stereotype as a belief; prejudice as a feeling or attitude; and discrimination as behavior.¹⁸⁹ Stereotypes can be both positive and negative, but prejudice is defined as a negative feeling or attitude towards a group or members of a group.¹⁹⁰ The relations between these three concepts are complex, and both social psychologists¹⁹¹ and lawyers still have a lot of work to do here. It is uncontested that stereotypes and prejudice can cause discrimination, but the causal connection can also be reversed.¹⁹² This topic is picked up in Chapter Three. For now, I just wish to add that stigma is also closely related to stereotypes, prejudice and discrimination.¹⁹³ A stigma is a badge of inferiority; it is a social label that signals that somebody is unworthy.¹⁹⁴ Several legal scholars – notably R.A. Lenhardt in the American context and Iyiola Solanke in the European context – view stigma as the most promising concept to improve equal protection law.¹⁹⁵ The reason the focus in this dissertation is not primarily on stigma, is that the scope of this concept is too limited: stigma holds much less purchase when it comes to explaining the harm that “positive” stereotypes can do (as in the case of benevolent sexism). Nor can stigma explain what harm a stereotype that is statistically correct but incorrect for a specific individual can do: ¹⁹⁶ is it fair, for example, to exclude women from combat positions in the military because they are generally less strong than men, when there are individual women who might be very well qualified for such positions?¹⁹⁷ The notion of stigma will not help much

¹⁸⁸ See, e.g., STEREOTYPES AND PREJUDICE: ESSENTIAL READINGS (Charles Stangor ed., 2000); HANDBOOK OF PREJUDICE, STEREOTYPING AND DISCRIMINATION (Todd D. Nelson ed., 2009); THE SAGE HANDBOOK OF PREJUDICE, STEREOTYPING AND DISCRIMINATION 3, 5 (John F. Dovidio et al. eds., 2010); and SCHNEIDER, *supra* note 165, at 376-433.

¹⁸⁹ See, e.g., Stangor, *supra* note 160, at 1.

¹⁹⁰ Stangor, *supra* note 164, at 2.

¹⁹¹ See, e.g., Susan T. Fiske et al., *The Future of Research on Prejudice, Stereotyping and Discrimination*, in HANDBOOK OF PREJUDICE, STEREOTYPING AND DISCRIMINATION 525, 526 (Todd D. Nelson ed., 2009).

¹⁹² Cf. SCHNEIDER, *supra* note 165, at 268.

¹⁹³ See, e.g., *id.* at 474-500; and Jo C. Phelan, Bruce G. Link & John F. Dovidio, *Stigma and prejudice: One animal or two?*, 67 SOCIAL SCIENCE & MEDICINE 358 (2008).

¹⁹⁴ See generally ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY (1963).

¹⁹⁵ R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 NEW YORK UNIVERSITY LAW REVIEW 803 (2004); and Iyiola Solanke, *Stigma: A limiting principle allowing multiple-consciousness in anti-discrimination law?*, in EUROPEAN UNION NON-DISCRIMINATION LAW: COMPARATIVE PERSPECTIVES ON MULTIDIMENSIONAL EQUALITY LAW 115 (Dagmar Schiek & Victoria Chege eds., 2009).

¹⁹⁶ About statistical stereotypes, see *infra* Chapter 3.III.B and V.A.

¹⁹⁷ See for a discussion of the links between this exclusion from combat and stereotypes, e.g., Valorie K. Vojdik, *Beyond Stereotyping in Equal Protection Doctrine: Reframing the Exclusion of Women From Combat*, 57 ALABAMA LAW REVIEW 303 (2005-2006).

in answering these kinds of questions. Ultimately, in my opinion, stereotype is a broader concept than stigma, and carries more potential to explain and contest the mechanisms that generate inequality.

Thus this thesis will argue that the Strasbourg Court can deploy the anti-stereotype concept to develop a more deeply transformative equality case law, and it will propose that the Court does this by integrating the concept in Article 14 analysis. That does not mean that this thesis will argue that the Strasbourg Court is the answer to all problems connected with stereotyping. To the contrary, I think of the Strasbourg Court as a minor actor in a bigger battle against harmful stereotyping.¹⁹⁸ This battle is held on many fronts: both legal and non-legal (such as via media and education). The only way the Court can play its role, however, is by carefully crafting legal reasoning that names stereotypes and exposes their harm. In that context, there is one point that requires particular emphasis. John Hart Ely has stated that point concisely: “[s]tereotypes . . . are the inevitable stuff of legislation.”¹⁹⁹ Equality scholars have long been aware that a state cannot be run by judges who balance each individual case *ad hoc*: we need laws and laws are based on generalizations.²⁰⁰ Therefore, the point of this dissertation is *not* that the ECtHR should turn itself against all stereotypes. That would be a fool’s errand. The challenge is to separate “the acceptable stereotypes from the unacceptable.”²⁰¹ This thesis will advance some suggestions as to how the Strasbourg Court can do that: most important is that the Court makes a thorough contextual analysis which exposes the effect that a stereotype has on a particular applicant and her group.²⁰²

C) Vulnerability

The concept of vulnerability is the other lens through which this thesis critically analyses the legal reasoning of the ECtHR. Whereas the focus on stereotyping grew out of a realization that stereotyping is a distinctive (empirical) problem that needs to be addressed through human rights law, the focus on vulnerability comes from my engagement with human rights doctrine. As was already mentioned in the introduction to this chapter, human rights law and literature are full with references to “vulnerable groups” and “vulnerability”. This is quite striking, once one becomes aware of it. Most of the time,

¹⁹⁸ See also Chapter 6.II.G.

¹⁹⁹ JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 156 (1980).

²⁰⁰ See e.g., Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CALIFORNIA LAW REVIEW 341, 343-344 (1949). See more generally FREDERICK SCHAUER, *PROFILES, PROBABILITIES AND STEREOTYPES* (2003).

²⁰¹ ELY, *supra* note 199, at 156.

²⁰² See *infra* Chapter 2.IV; Chapter 3.V; and Chapter 6.II.E.

however, it seems that these terms are used automatically, without any reflection on their precise meaning. The case law of the ECtHR forms no exception. A search in the Court's search engine, Hudoc, using the term "vulnerable", delivers hundreds of hits. The origins of the reasoning in terms of vulnerability lie in cases from the early 1980s – including *Dudgeon v. UK*,²⁰³ *Glaserapp v. Germany*,²⁰⁴ and *X. and Y. v. the Netherlands*²⁰⁵ – where the Commission and the Court referred to the vulnerability of children. However, despite these old roots and the frequency with which the term occurs in the case law nowadays, the Strasbourg Court has hardly made any effort to clarify how it understands vulnerability.²⁰⁶ This thesis investigates how the Court uses both the concept of "vulnerable groups", and the concept of "vulnerability" more generally, in order to see what potential these concepts have to strengthen the Court's reasoning.

How should vulnerability be understood? Chapters Four and Five address this question extensively, both from theoretical and jurisprudential viewpoints. Briefly then, the word "vulnerable" comes from the Latin *vulnus*, meaning "wound".²⁰⁷ In line with this, many definitions conceive of vulnerability as the openness to attack or hurt.²⁰⁸ The etymology of the term draws attention to the close connection of vulnerability to embodiment: people are vulnerable, they can be wounded, because they are embodied. As embodied beings, vulnerability is part of our human condition. Thus, vulnerability is universal. At the same time however, vulnerability is also particular.²⁰⁹ Depending on the

²⁰³ *Dudgeon v. United Kingdom*, App. No. 7525/76, 22 October 1981, ¶ 47, 49 and 62. In ¶ 62, the Court recognized: "the legitimate necessity in a democratic society for some degree of control over homosexual conduct notably in order to provide safeguards against the exploitation and corruption of those who are specially vulnerable by reason, for example, of their youth".

²⁰⁴ *Glaserapp v. Germany (Commission)*, App. No. 9228/80 9228/80, 11 May 1984, ¶ 112. This was a freedom of expression case (article 10) which concerned the appointment of a grammar school teacher who had been affiliated with the Communist Party of Germany. The Commission spoke of "pupils of an impressionable age" who are vulnerable to indoctrination.

²⁰⁵ Report by the Commission, *X. and Y. v. the Netherlands*, 5 July 1983; *X. and Y. v. the Netherlands*, App. No. 8978/80, 26 March 1985. Y, who had a mental disability, was assaulted and sexually abused when she was a sixteen year old girl by a relative of the directress of the house where she was living. The Dutch law in force at the time did not provide adequate criminal-law sanctions for this situation, in which the victim could not herself complain of her assault. The Commission (but not the Court) emphasized the vulnerability of the applicant numerous times in its report.

²⁰⁶ The one notable exception is Judge Sajó separate opinion in *M.S.S. v. Belgium and Greece*, App. No. 30696/09, 53 Eur. H.R. Rep. 2 (2011) (Sajó J., partly concurring and partly dissenting).

²⁰⁷ BRYAN S. TURNER, *VULNERABILITY AND HUMAN RIGHTS* 28 (2006).

²⁰⁸ See, e.g., *SHORTER OXFORD ENGLISH DICTIONARY* (sixth ed. 2007) at 3557: which defines vulnerability as "Able to be wounded; (of a person) able to be physically or emotionally hurt; liable to damage or harm, esp. from aggression or attack, assailable."

²⁰⁹ See, e.g., Fineman, *supra* note 128, at 10; Martha Albertson Fineman, *Beyond Identities: The Limits of an Antidiscrimination Approach to Equality*, 92 BOSTON UNIVERSITY LAW REVIEW 1713, 1754 (2012); and Kate Kaul,

particularities of our body, our geographical location, our social resources and a host of other factors, everybody experiences their vulnerability differently. Moreover, vulnerability is not only physical: people can also be economically, emotionally, or socially vulnerable. Depending on these different factors, some are more vulnerable than others.

This thesis builds on a rapidly growing field of legal scholarship that theorizes vulnerability, and in particular on Martha Fineman's work. Fineman has developed a vulnerability thesis, which she describes as follows:

I want to claim the term "vulnerable" for its potential in describing a universal, inevitable, enduring aspect of the human condition that must be at the heart of our concept of social and state responsibility. Vulnerability thus freed from its limited and negative associations is a powerful conceptual tool with the potential to define an obligation for the state to ensure a richer and more robust guarantee of equality than is currently afforded under the equal protection model.²¹⁰

Fineman emphasizes that vulnerability is not only a negative human condition; in many ways it is also *generative*. Vulnerability causes people to forge bonds with each other and with their environment, and it causes people to create institutions.²¹¹ Fineman argues that her analysis is capable of delivering substantive equality (in my vocabulary this would be *transformative* equality) because it turns the inquiry to the "institutional practices that produce the identities and inequalities in the first place."²¹² She thinks of social institutions as the mechanisms through which "we gain access to resources with which to confront, ameliorate, satisfy, and compensate for our vulnerability."²¹³ What complicates the analysis, however, is that as human constructs, institutions are vulnerable in and of themselves.²¹⁴

Fineman's vulnerability thesis is more directed towards law- and policymakers than towards judges. Her thesis is not "a blueprint for judicial review", nor does this dissertation draw on it as such.²¹⁵

Vulnerability, for Example: Disability Theory as Extraordinary Demand, 25 CANADIAN JOURNAL OF WOMEN AND THE LAW 81, 109 (2013) ("An understanding of vulnerability must recognize both its universal character and its particularity, its specific operation in the present moment".)

²¹⁰ Fineman, *supra* note 128, at 8-9.

²¹¹ Martha Albertson Fineman, "Elderly" as Vulnerable: Rethinking the Nature of Individual and Societal Responsibility, 20 THE ELDER LAW JOURNAL 101 (2012).

²¹² Fineman, *supra* note 128, at 16.

²¹³ Fineman, *supra* note 209, at 1756.

²¹⁴ Fineman, *supra* note 128, at 12-13.

²¹⁵ Fineman, *supra* note 209, at 1763.

This study merely uses her framework as a yardstick against which to assess the Strasbourg Court's case law; it does not suggest that the Strasbourg Court adopt the vulnerability thesis wholesale. Two features of the vulnerability thesis seem particularly apt in the context of the ECtHR, however. First is the emphasis on universal vulnerability – with the attendant reminder that when only particular groups are held to be vulnerable, this is likely to affix a stigma to these groups and will not lead to transformative equality. The second helpful feature of the thesis is its focus on institutions and their vulnerability. As Chapter Five will discuss, the Strasbourg Court forms in this respect no exception: the Court is vulnerable too and this has powerful implications for its legal reasoning in terms of vulnerability.

IV. Limits to what is possible: critiques of rights and the precarious institutional position of the Strasbourg Court

Thus far this introductory chapter might have given the impression that this study, which is focused on “improving the legal reasoning” and “transformative equality”, is very ambitious in its goals for the ECtHR and, by extension, very confident in the powers of the Court. In truth, I am ambivalent about the possibilities for human rights law generally (including the ECtHR more particularly) to close the gap between rhetoric and reality that was identified at the beginning of this chapter. There is one principled problem and one pragmatic problem that need to be mentioned here more specifically.²¹⁶ The principled problem is that the potential of rights to achieve change is limited. This is a fundamental issue, which has been much explored in critical legal scholarship. Section IV.A will acknowledge the validity of the critiques of rights and clarify the position of this thesis vis-à-vis these critiques. The practical problem concerns the institutional position of the Strasbourg Court: as a supranational judicial body, there are clearly limits to what the Court can achieve. This practical constraint runs explicitly as a common thread throughout the next chapters; section IV.B will just provide a short introduction to the question how the institutional position of the ECtHR shapes the possibilities to improve its legal reasoning.

²¹⁶ Cf. DEMBOUR, *supra* note 73, at 4-6. Dembour argues that “critiques of human rights can either require human rights to be true to their word or reject them as constructed on unsound premises.” *Id.* at 5. She calls this the “practical” and the “conceptual” critiques of human rights. Practical critiques focus on how a better human rights practice could be elaborated; conceptual critiques find the concept of human rights so fundamentally flawed that solutions tend to be sought outside of human rights logic.

A) Principled difficulties: critiques of rights

What promise have human rights to deliver justice to disadvantaged or marginalized people? Feminist theorists and other critical legal scholars have long cautioned against the simple adoption of rights discourse.²¹⁷ Their point is well taken. This section will reflect on these critiques and the position of this PhD in relation to the inherent difficulties of rights strategies.

On the one hand, the appeals of rights are manifold. Importantly, couching a claim in terms of a “right” provides the claim with legitimacy, or at least legibility.²¹⁸ Indeed, as Carol Smart pointed out in her classic *Feminism and the Power of Law* (1989):

“It is very difficult to formulate demands of the state which can command popular support and which are translatable into legislation and policy without drawing on the discourse of rights. Not only are rights part of the very history of modern social movements, they also give status to the groups or minorities who are making demands. The person demanding her rights is not a supplicant or a seeker of charity, but a person with dignity demanding a just outcome according to widely accepted criteria of fairness.”²¹⁹

Accordingly, asserting one’s rights can be an empowering experience, especially, it has been argued, for people whose rights were invisible before.²²⁰ The idea of rights has provided an important tool in the struggle of many social movements, such as the civil rights movement in the United States, the struggle of women to get the vote and – later on – equality in marriage, and the current struggle of the LGBT community for recognition of marriage equality.²²¹ That is to say: rights have brought non-dominant groups important gains.

²¹⁷ See, e.g., Wendy Brown, *Suffering Rights as Paradoxes*, 7 CONSTELLATIONS 208 (2000); Duncan Kennedy, *The Critique of Rights in Critical Legal Studies*, in LEFT LEGALISM/LEFT CRITIQUE 178 (Wendy Brown and Janet Halley, eds., 2002); Nicola Lacey, *Feminist Legal Theory and the Rights of Women*, in GENDER AND HUMAN RIGHTS 13, 38- 53 (Karen Knop ed., 2004); and CAROL SMART, *FEMINISM AND THE POWER OF LAW* (1989), Ch. 7.

²¹⁸ SMART, *supra* note 217, at 143.

²¹⁹ *Id.* at 152.

²²⁰ Patria Williams, *Alchemical Notes: Reconstructed Ideals from Deconstructed Rights*, 22 HARVARD CIVIL RIGHTS- CIVIL LIBERTIES LAW REVIEW 401, 431 (1987) (“‘Rights’ feels so new in the mouths of most black people. It is still so deliciously empowering to say. . . . It is the magic wand of visibility and invisibility, of inclusion and exclusion, and of power and no power.”).

²²¹ See *generally* about the connections between human rights and social movements: NEIL STAMMER, *HUMAN RIGHTS AND SOCIAL MOVEMENTS* (2009).

On the other hand, “rights are a creature of the state and hence a function of existing configurations of power.”²²² The language of human rights is used by states to legitimize and enhance their power.²²³ In that context, rights are arguably of limited use to oppressed groups who want to challenge existing power relations. Audre Lorde has captured this kind of objection powerfully: “the master's tools will never dismantle the master's house”.²²⁴ Indeed, using human rights law to further an emancipatory goal carries grave dangers with it: it may entrench the very hierarchies it seeks to challenge, inter alia because human rights discourse is so deeply steeped in a victims-rhetoric.²²⁵ And this is just part of the ills that beset rights:²²⁶ other problems are the individualism of rights, meaning that rights are held by individuals who are thought to be in a competition with others to assert their entitlement,²²⁷ and the limited range of remedies for individual rights’ violations.

In face of these critiques, the present PhD project raises qualms: its focus on case law analysis might seem to put law, and the possibilities of law to achieve equality, on a pedestal. Moreover, the articles about stereotyping argue in favor of a stronger role of the ECtHR in a domain where – *prima facie* at least – extralegal measures (such as consciousness-raising through media and education) might seem more apposite.²²⁸ To a certain extent, my work on stereotyping envisages a greater role for human rights law than it has at present. Furthermore, the focus on “vulnerability” might only seem to heighten the victims-discourse that is so damaging to the human rights project. In different ways, therefore, the (anti-)stereotyping and vulnerability approaches can run afoul of the pitfalls of rights that were just described. Whenever I can identify a concrete pitfall – as with the risk of vulnerability reasoning to reinforce victimization²²⁹ – this is indicated in the text, together with suggestions how the Court can deal with it.

To respond to the principled critiques of rights on the same principled level, it should be emphasized that this PhD is ultimately a *constructive project*. It is based on the premise that human rights should not be given up as a hopeless endeavor; on the contrary, human rights need to be strengthened – they need to be fought for. In this context, the present study views human rights as

²²² Lacey, *supra* note 217, at 39.

²²³ See, e.g., COSTAS DOUZINAS, THE END OF HUMAN RIGHTS 374-375 (2000); SMART, *supra* note 217.

²²⁴ AUDRE LORDE, SISTER OUTSIDER: ESSAYS AND SPEECHES 110 (1984).

²²⁵ See e.g., Ratna Kapur, *The Tragedy of Victimization Rhetoric: Resurrecting the “Native” Subject in International/Post-Colonial Feminist Legal Politics*, 15 HARVARD INTERNATIONAL LAW JOURNAL 1 (2002); Makau Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 HARVARD INTERNATIONAL LAW JOURNAL 201 (2001).

²²⁶ For a general overview of critiques of rights see, e.g., TOM CAMPBELL, RIGHTS: A CRITICAL INTRODUCTION 11-19 (2006).

²²⁷ Lacey, *supra* note 217, at 38-39.

²²⁸ See *infra* Chapter 6.II.G.

²²⁹ This and other problems with vulnerability reasoning are addressed in Chapter 4.III.C.

aspirations, as “perpetual callings”: they are not something that can be achieved, but only something that can be struggled for.²³⁰ And human rights are worth the struggle. If the world could start with a clean slate we would probably not devise the current human rights regime as the preeminent justice idea.²³¹ At this point in history, however, it is very hard to contemplate restructuring this regime and the attendant idea of rights.²³² For better *and* worse, human rights carry huge symbolic and political force. So for me, as for many others, the resort to human rights law to ameliorate the position of disadvantaged groups is a pragmatic and strategic choice.²³³ This is also the spirit in which the (anti-)stereotyping approach and the vulnerability approach are offered: these approaches will surely not allow the Strasbourg Court to definitively close the gap between the human rights of the “haves” and the human rights of the “have nots” in Europe – that is beyond the power of the Court – but it is hoped that these approaches can provide valuable tools in the struggle.

B) Practical difficulties: the institutional position of the ECtHR

On a more pragmatic level, what runs as a common thread throughout the next chapters is a concern with the practical feasibility of the ambitious equality agenda that this thesis advocates. In order to be persuasive, any proposal for improvement of the Court’s legal reasoning has to be concretely feasible. This is foremost a matter of taking the institutional position of the ECtHR into account. In other words, what one can ask of the Court to do is intrinsically bound up with the Court’s institutional reality.

As the guardian of the European Convention, the Strasbourg Court is influential and vulnerable at the same time. The Court is influential in the sense that its judgments are binding and domestic judges in all the 47 member states of the Council of Europe look to it for guidance in interpreting

²³⁰ DEMBOUR, *supra* note 73, at 245. Marie Dembour would classify me, together with other scholars who conceive of human rights as *fought for*, as a “protest scholar”. The other types of scholars she has distinguished are “natural scholars” who conceive of human rights as *given*; “deliberative scholars” who conceive of human rights as *agreed upon*; and “discourse scholars” who conceive of human rights as *talked about*. See *id.*, Ch. 8; and Marie-Bénédicte Dembour, *What Are Human Rights? Four Schools of Thought*, 32 HUMAN RIGHTS QUARTERLY 1 (2010).

²³¹ John Rawls has developed his famous “theory of justice” based on the thought experiment of what would happen if we did start from a clean slate, which he terms “the original position”. See JOHN RAWLS, *A THEORY OF JUSTICE* (1999, rev. ed.).

²³² Cf. Williams, *supra* note 220, at 431 (“[Rights] is a sign for and a gift of selfhood that is very hard to contemplate restructuring . . . at this point in history.”)

²³³ See specifically in relation to the ECHR, e.g., DEMBOUR, *supra* note 73, at 275; and Stephanie Palmer, *Critical Perspectives on Women's Rights: The European Convention on Human Rights and Fundamental Freedoms*, in FEMINIST PERSPECTIVES ON THE FOUNDATIONAL SUBJECTS OF LAW 223, 227 (A. Bottomley ed., 1996).

domestic law.²³⁴ As the Convention is a “living document,” the Court moreover applies the Convention in an ever broader range of areas. But, to repeat, the Court is also vulnerable. Several features render it vulnerable. First, there is what has been described as the “dual functionality” of the Court:²³⁵ the Strasbourg Court has to deliver both individual and constitutional justice.²³⁶ Individual justice refers to the individual complaints mechanism which is at the core of the Convention system:²³⁷ thanks to this mechanism everyone within the Council of Europe – approximately 800 million people²³⁸ – is entitled to file a complaint with the ECtHR and – when the admissibility criteria have been met²³⁹ – to receive judgment from the Court on their case. As regards individual justice, it is conventional wisdom that the Court is becoming a “victim of its own success”.²⁴⁰ By the end of 2012 there were 128,100 applications pending before the Court.²⁴¹ The real victims of this state of affairs are of course the applicants, not the Court itself. Undeniably, however, the backlog in cases creates problems for the Court: it weakens the Court’s legitimacy and puts the Court under a lot of pressure to deliver an ever-increasing amount of judgments. Constitutional justice, on the other hand, can be understood to mean several things but at a minimum it connotes the Court’s role as clarifier and developer of general standards and principles of European human rights Convention law. On this view, the Convention is “a constitutional instrument of European public order”²⁴² in the field of human rights and the Court’s job is to develop general human rights principles, which then need to be implemented on the domestic level. Its dual functionality, which entails that the Court delivers both a great quantity of judgments and great quality of legal reasoning, stretches the Court thin.

²³⁴ See generally, e.g., Helen Keller & Alec Stone Sweet, A EUROPE OF RIGHTS: THE IMPACT OF THE ECHR ON NATIONAL LEGAL SYSTEMS (2008).

²³⁵ Fiona de Londras, *Dual functionality and the persistent frailty of the European Court of Human Rights*, EUROPEAN HUMAN RIGHTS LAW REVIEW 38 (2013).

²³⁶ See, e.g., Jonas Christoffersen, *Individual and Constitutional Justice: Can the Power Balance of Adjudication be Reversed?*, in THE EUROPEAN COURT OF HUMAN RIGHTS BETWEEN LAW AND POLITICS 181 (Jonas Christoffersen & Mikael Rask Madsen eds., 2011); STEVEN GREER, THE EUROPEAN CONVENTION ON HUMAN RIGHTS: ACHIEVEMENTS, PROBLEMS AND PROSPECTS 165-189 (2006); Steven Greer and Luzius Wildhaber, *Revisiting the Debate about ‘constitutionalising’ the European Court of Human Rights*, 12 HUMAN RIGHTS LAW REVIEW 655 (2012); Robert Harmsen, *The European Convention on Human Rights after Enlargement*, 5 THE INTERNATIONAL JOURNAL OF HUMAN RIGHTS 18 (2001); Helfer, *supra* note 3, at 138-141; de Londras, *supra* note 235; and L. Wildhaber, *A Constitutional Future for the European Court of Human Rights*, 23 HUMAN RIGHTS LAW JOURNAL 161-165 (2002).

²³⁷ The right of individual application to the ECtHR is laid down in Article 34 ECHR.

²³⁸ On top of that, not only natural persons but also non-governmental organizations and other legal persons can file complaints at the ECtHR; see Article 34 ECHR.

²³⁹ The admissibility criteria are laid down in Articles 34 and 35 ECHR.

²⁴⁰ Helfer, *supra* note 3, at 126.

²⁴¹ ECtHR, ANALYSIS OF STATISTICS 2012, at 4, available at: http://www.echr.coe.int/Documents/Stats_analysis_2012_ENG.pdf.

²⁴² *Loizidou v. Turkey* (GC), App. No. 15318/89, A 310 (1995), ¶ 75.

The second major factor that renders the Court vulnerable is political will. Successive Presidents of the Court have now emphasized the importance of this factor.²⁴³ Judge Bratza put it like this in 2012:

The Court is a dynamic institution, but also in many respects a fragile one, which ultimately relies heavily on the support and good faith of the Council of Europe member States. ... protecting human rights does not make you popular. Standing up for the rule of law will not win you votes, at least not in the short term. Accepting that even those who come to destroy democracy must benefit from the protection of the fundamental rights without which democracy has no real sense is never going to be easy to sell to public opinion. Yet that is the essence of what we do here, what the Court represents and what the Council of Europe stands for.²⁴⁴

In recent years the Strasbourg case law has triggered a barrage of criticism for what is perceived as its meddling with sensitive issues that should properly belong to the purview of domestic authorities.²⁴⁵ Examples include the frustration of the British following the case of *Hirst v. UK (No.2)* concerning the voting rights of prisoners,²⁴⁶ and their anger following the case of *Othman (Abu Qatada) v. UK* at not being allowed to extradite Abu Qatada to his native Jordan, where he was convicted of terrorism, because there was a real risk that the evidence against Qatada was obtained through torture.²⁴⁷ This kind of criticism, which attacks the Court for interfering in matters of human rights law application that pertain to the States, comes from politicians,²⁴⁸ judges,²⁴⁹ and academics alike.²⁵⁰ As the Court is not only

²⁴³ See, e.g., Jean-Paul Costa, *Current Challenges for the European Court of Human Rights: A Raymond and Beverly Sackler Distinguished Lecture in Human Rights* 11-12 (Leiden Law School, Dec. 10, 2011), available at <http://media.leidenuniv.nl/legacy/current-challenges-for-the-european-court-of-human-rights--sackler-lecture-by-costa-doc.pdf>.

²⁴⁴ Quoted in Marc de Werd, *Kann die Liebe Sünde sein? Adjudicating sensitive moral issues in Europe*, 2 February 2013, available at: <http://europeancourts.blogspot.co.uk/2013/02/kann-die-liebe-sunde-sein-judging-in.html>

²⁴⁵ See generally, e.g., *THE EUROPEAN COURT OF HUMAN RIGHTS AND ITS DISCONTENTS: TURNING CRITICISM INTO STRENGTH* (Spyridon Flogaitis, Tom Zwart & Julie Fraser eds., 2013).

²⁴⁶ *Hirst v. United Kingdom (No. 2)* (GC), App. No. 74025/01, 42 Eur. H.R. Rep. 41 (2006).

²⁴⁷ *Othman (Abu Qatada) v. United Kingdom*, App. No. 8139/09, 17 January 2012. For an example of the strong negative reactions this case engendered, see, e.g., Stephen Pollard, *Put Abu Qatada on a plane and quit the European Court*, EXPRESS UK, April 20, 2012 (“[Cameron] should stand up in the house of Commons and announce that, because of the court’s wilful refusal to restrain its interference in the sovereign affairs of nation states, the UK no longer recognises its jurisdiction and is withdrawing from the treaty. From this moment on British human rights disputes – and national security – will be determined by British judges in British courts. Our Supreme Court will be just that – supreme.”).

²⁴⁸ For example, Theresa May, the UK home secretary, has said that “all options – including leaving the convention altogether – should be on the table”. See Joshua Rozenberg, *UK pullout from European rights convention would be “total disaster”*, THE GUARDIAN, 4 June 2013, available at: <http://www.theguardian.com/law/2013/jun/04/uk-european-human-rights-convention>.

dependent on the Council of Europe Member States for the implementation of its judgments, but also for its very survival, it has no choice but to take these critiques seriously. Put simply, one cannot expect the Strasbourg Court to move too far ahead of the Member States.

How does the Court's institutional position put a limit on the proposals of this PhD, that center on anti-stereotyping and vulnerability reasoning? The first-mentioned factor that characterizes the Court's precarious institutional position, namely its work overload due to its dual functionality, undoubtedly has an impact on projects like this one that aim to improve the legal reasoning of the Court. When the Court is structurally pressed for resources, can one ask the Court to spend more thought on the problem of stereotyping,²⁵¹ and to be more careful in its reasoning to explicate the factors that render a specific applicant vulnerable?²⁵² It is submitted that the answer is yes, precisely because there is so much at stake here. Devising effective human rights protection for non-dominant groups and "making equality rights real" in the legal reasoning should be at the core of the Court's work.²⁵³ The second factor that renders the Court vulnerable – political will – has even more significant implications for the present study. It is remarkable how often the sharpest Court-criticism is reserved for cases that concern applicants from non-dominant groups, such as prisoners and asylum seekers. To rephrase Judge Bratza;²⁵⁴ protecting the human rights of non-dominant groups will not necessarily make the Court popular, nor will adhering to a transformative equality agenda do so. The next chapters indicate where the rubs lie precisely between my proposals and the Court's institutional reality.²⁵⁵ Before the present introductory chapter can be concluded, however, the research methods on which this thesis has relied will be discussed.

V. Research Methods

²⁴⁹ See, e.g., Lord Hoffmann, *Judicial Studies Board Annual Lecture* (19 March 19, 2009), available at: http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/Hoffmann_2009_JSB_Annual_Lecture_Universality_of_Human_Rights.pdf.

²⁵⁰ See, e.g., Flogaitis, Zwart & Fraser, *supra* note 245.

²⁵¹ This is an argument that is made in Chapter Two, *infra*.

²⁵² This point is made *infra* in Chapter 4.III.C.

²⁵³ Cf. book title "Making Equality Rights Real", Faraday, Denike & Stephenson, *supra* note 121.

²⁵⁴ See text accompanying *supra* note 244.

²⁵⁵ See *infra* Chapter 2.VI; Chapter 4.V; Chapter 5.V and Chapter 6.II.G and III.F.

This thesis provides a close analysis of the legal reasoning of the ECtHR. Thus, the primary source of this analysis is the Strasbourg case law itself. From the beginning of the European Research Council project “Strengthening the European Court of Human Rights: More Accountability Through Better Legal Reasoning” in the autumn of 2009, Professor Brems’ research team has met every two weeks to discuss the latest case law. This allowed the whole team, including myself, to remain up-to-date with the recent developments in the legal reasoning of the Court.²⁵⁶ To a significant extent, the research of this thesis has been led by these developments. The focus on the concept of vulnerability in particular, as section V.B will shortly proceed to explain, has been developed as a response to recent case law.

My strategy has been similar as regards both stereotyping and vulnerability: these concepts were chosen because (a) they were already present in the case law; (b) because, in contrast to other legal concepts – notably “dignity”²⁵⁷ – they are under-theorized in (the Strasbourg Court’s) human rights law and literature;²⁵⁸ and (c) both hold unexplored potential to improve the Court’s legal reasoning as regards non-dominant groups. This part will now first proceed to discuss in very practical terms the methodology as regards the articles on stereotyping (section V.A) and then the methodology of the articles on vulnerability (section V.B). It concludes by addressing the question of methodology on a more conceptual level, namely by reflecting on the role of feminist methods in this thesis (section V.C).

A) Stereotyping Articles: Chapters Two and Three

Part 3 of this chapter already mentioned that my understanding of equality, and the central role of stereotyping therein, has been crucially influenced by the work of the CEDAW Committee. In fact, it was through the work of CEDAW scholars – particularly Rikki Holtmaat²⁵⁹ – that I was first made aware of the concept of stereotyping and its relevance to human rights law. Subsequently, I have turned to social

²⁵⁶ We have explored many of these developments on our blog: www.strasbourgobservers.com.

²⁵⁷ See, e.g., Susanne Baer, *Dignity, Liberty, Equality: A Fundamental Rights Triangle of Constitutionalism*, 59 UNIVERSITY OF TORONTO LAW JOURNAL 417 (2009); Evadné Grant, *Dignity and Equality*, 7 HUMAN RIGHTS LAW REVIEW 299 (2007); Jürgen Habermas, *The Concept of Human Dignity and the Realistic Utopia of Human Rights*, 41 METAPHILOSOPHY 464 (2010); Tarunabh Khaitan, *Dignity as an expressive norm: neither vacuous nor a panacea*, 32 OXFORD JOURNAL OF LEGAL STUDIES 1 (2012); Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUROPEAN JOURNAL OF INTERNATIONAL LAW (2008); and Rory O’Connell, *The Role of Dignity in Equality Law: Lessons from Canada and South Africa*, 6 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 267 (2008).

²⁵⁸ Cf. Martha Fineman’s statement that: “The technique is to focus on a concept or term in common use, but also grossly under-theorized, and thus ambiguous.” Fineman, *supra* note 128, at 9.

²⁵⁹ See, e.g., RIKKI HOLTMAAT, TOWARDS DIFFERENT LAW AND PUBLIC POLICY: THE SIGNIFICANCE OF ARTICLE 5A CEDAW FOR THE ELIMINATION OF STRUCTURAL GENDER DISCRIMINATION (2004); Holtmaat, *supra* note 143; and HOLTMAAT & NABER, *supra* note 148.

psychological literature to strengthen my grasp on the topic of stereotypes. As social psychologists have developed a whole field of science around this topic, the relevant literature is vast. That is why I have chosen several handbooks on stereotyping and discrimination and started my investigation there, using a snowball method.²⁶⁰ While this study does not pretend to be interdisciplinary in scope or purpose, it is based on the assumption that the central empirical findings of social psychologists are relevant to take into account. The legal understanding of the concept of stereotype should diverge as little as possible from the psychological/empirical understanding.

In the context of my research on stereotyping, two events need to be mentioned. The first is that the Human Rights Centre of Ghent University submitted a third party intervention to the Grand Chamber in the case of *Konstantin Markin v. Russia* on May 17, 2011.²⁶¹ As a third party, the Human Rights Centre had access to the case file which included the briefs submitted by the applicant and the State. I was actively involved in the writing of this third party intervention and this experience greatly impacted my doctoral research. The submissions by the Russian Government convinced me that many CoE Member States are unaware of the harm they can do by perpetuating stereotypes so that there is a lot of work to be done in this respect;²⁶² moreover, the Grand Chamber judgment, when it came out on 22 March 2012,²⁶³ encouraged me in my belief that stereotyping is a concept that the Court is willing and able to develop further.

The other event I should mention was my research visit to the University of Toronto Law School, which took place from 15 October till 15 November 2012. The purpose of this visit was to carry out research for the second stereotyping article, entitled *Judging Stereotypes: What the European Court of Human Rights Can Learn from American and Canadian Equal Protection Law* (Chapter Three). Especially the Canadian part of this comparative work was researched in Toronto. Professor Rebecca Cook very generously acted as my sponsor and constant interlocutor during this visit. Professor Cook has written

²⁶⁰ The handbooks in question are HANDBOOK OF PREJUDICE, STEREOTYPING AND DISCRIMINATION (Todd D. Nelson ed., 2009); SCHNEIDER, *supra* note 165; and STEREOTYPES AND PREJUDICE: ESSENTIAL READINGS (Charles Stangor ed., 2000). See *supra* Chapter 1.III.B.

²⁶¹ The third party intervention is *available at*: <http://www.ugent.be/re/publiekrecht/en/departement/human-rights/publications/amicus.pdf>.

²⁶² The Russian Government strongly relied on a prescriptive stereotype in their submissions to the Court in this case, namely the stereotype that mothers (rather than fathers) ought to be at home to care for their young children. The State observed: “The support of the child’s interest require in fact the presence of his/her mother next to a child at least during the first year”. *Additional Memorandum of the Russian Federation Authorities on the Questions Posed by the European Court of Human Rights to Oral Hearings, Application No. 30078/06, Konstantin Markin v. Russia*, Moscow, 28 April 2011 [on file with author], at 26.

²⁶³ *Konstantin Markin v. Russia* (GC), App. No. 30078/06, 56 Eur. H.R. Rep. 8 (2013).

extensively about gender stereotypes and is co-author of *Gender Stereotyping: Transnational Legal Perspectives*.²⁶⁴ My understanding of Canadian equal protection law was also greatly enhanced by the conversations I had in Toronto with Professor Sophia Moreau and Professor David Schneiderman.

Case law selection and analysis

How were the ECtHR judgments for the two articles on stereotyping obtained? As with the social psychology literature on stereotypes, I have partly used a snowball method. By way of the Court's references to its own case law, as well as on the basis of both secondary literature and the bi-weekly case law discussions of Professor Brems' research team, I sought to find the most salient cases on the topic of stereotyping. As a result, this study does not represent a systematic analysis of all the Court's judgments that include a stereotyping issue. That was not feasible, since that would require an analysis of all the 16.000+ judgments the Court ever delivered. The problem is that the Court does not explicitly use the term "stereotype" regularly when it is confronted with stereotypes – indeed, that is part of my argument: that the Court should start naming stereotypes as such²⁶⁵ – therefore there is no reliable way of obtaining the relevant case law through a straightforward search in the Court's database, Hudoc. One possibility was to analyze all Article 14 cases, but that would not yield an exhaustive list of stereotyping cases either, as stereotypes often appear in cases that are examined under other Convention provisions.²⁶⁶ While my chosen method implies that not all ECtHR cases that include a stereotyping issue are discussed in this thesis, it is submitted that this does not undermine the strength of the analysis, as this thesis is based on the cases which contain the most interesting lines of reasoning about stereotypes.

In contrast to the ECtHR, the American and Canadian Supreme Courts do use the term stereotype. This greatly facilitated the case law search for Chapter Three; the Chapter entitled *Judging Stereotypes: What the European Court of Human Rights Can Learn from American and Canadian Equal Protection Law*. Consequently, the American and Canadian jurisprudence was obtained through Westlaw using the search term "stereotyp*", thus receiving all the cases that include the words stereotype(s) or stereotyping.²⁶⁷ I checked all the results which were found in this manner, and selected

²⁶⁴ COOK & CUSACK, *supra* note 143.

²⁶⁵ See *infra* Chapter 2.IV.B; and Chapter 3.II.D.

²⁶⁶ Indeed, when the Court does name stereotypes, it often does so under one of the other articles of the Convention. See *infra* Chapter 3.II.B.

²⁶⁷ Using Westlaw, as of 1 August 2013 the number of U.S. Supreme Court cases that include this term is 99; the number of Canadian Supreme Court cases is 92.

the most important judgments for inclusion in this thesis on the basis of secondary literature from the U.S. and Canada.

Once a case was selected I would proceed to analyze it on the basis of close reading.²⁶⁸ Generally speaking, such a technique is well-suited to the overall project of “improving the legal reasoning of the Court”, as is borne out by this explanation of Mitchel De S.-O.-L.’E. Lasser of what “close reading” means:

“The basic idea is to approach the documents or arguments produced by a legal system as if they were serious literary works and thus to treat them with a similar degree of careful, detailed and almost exhaustive attention. . . . [T]his literary methodology assumes that . . . judicial decisions and other legal texts are significant not only because of the substantive results they enact, suggest or order, but also because of the ways those texts are composed.”²⁶⁹

For this study this would entail a meticulous reading and re-reading of the text of the judgment, during which I would pay special attention to the ways in which stereotypes seem to play a role in the case – whether perhaps the facts reveal that the Government implicitly or explicitly relied on a stereotype, or whether perhaps the applicant would uncover and complain about a stereotype in her submissions to the Court. Stereotypes are sometimes signaled by phrases like “in general”, “assumption” and “traditionally”, therefore I would take particular notice when these phrases are used in a judgment. Next I would closely read the Court’s response to these stereotypes: because silence is as much a constitutive feature of the Court’s reaction to stereotypes as is explicit response, this means I would dissect the text to find both explicit references to stereotypes *and* missed chances to do so.

In Chapter Three, which aims to draw lessons about stereotyping for the Strasbourg Court from the American and Canadian Supreme Courts, the case law analysis was furthermore informed by the comparative methodology of this part of the thesis. Concretely, comparing judgments from these three courts allowed me to distinguish more clearly among the different forms that stereotypes take. It turns out, as Chapter Three argues primarily on the basis of U.S. jurisprudence, that stereotypes can appear in

²⁶⁸ The term “close reading” comes from literary analysis and is sometimes used by lawyers to describe what they do when they carry out a legal analysis. See, e.g., Mitchel De S.-O.-L.’E. Lasser, *The Question of Understanding, in* COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS 197, 203-207 (Pierre Legrand & Roderick Munday eds., 2003).

²⁶⁹ *Id.* at 203.

four different shapes in legal reasoning.²⁷⁰ In this way, the comparative study enriched my case law analysis: it allowed me to “see” more in the text of the judgments; to go through the case law about stereotypes with a finer comb.

B) Vulnerability Articles: Chapters Four and Five

As mentioned above, the focus on vulnerability is a response to developments in the recent ECtHR case law. It was the separate opinion of Judge Sajó in the asylum case of *M.S.S. v. Belgium and Greece* (2011) that first drew Professor Brems’ research team attention to “vulnerability”.²⁷¹ Judge Sajó claimed that: “The concept of a vulnerable group has a specific meaning in the jurisprudence of the Court.”²⁷² And he then proceeded to expound at length on what this meaning is in his eyes. Frankly, up till that point I had not been much aware that “vulnerable groups” was a specific concept in the ECtHR case law. My colleague Lourdes Peroni analyzed Judge Sajó’s separate opinion in a blog post entitled *M.S.S. v. Belgium and Greece: When Is a Group Vulnerable?*, of 10 February 2011.²⁷³ Lourdes and I subsequently started discussing the idea of “vulnerable groups” and that is how our joint project started.

The resulting article, entitled *Vulnerable Groups: the Promise of an Emergent Concept in European Human Rights Convention Law* (Chapter Four), is essentially a product of dialogue. In the first place there was a constant dialogue between Lourdes and me. Importantly, we also had conversations with five ECtHR judges on the concept of vulnerable groups in the Court’s case law, namely Judges Tulkens, Myjer, Sajó, Power, and Vajić. These were informal conversations and they took place at the premises of the ECtHR in Strasbourg between 6 and 9 June 2011. These conversations left me with the impression that the Court, divided as it is in five Chambers, does not consciously employ a consistent policy when it comes to the concepts of “vulnerable groups” and “vulnerability”. At the same time, most judges expressed the sentiment that human vulnerability is really at the core of the work of the Court.

²⁷⁰ These four forms are role-typing, false, statistical, and prescriptive stereotypes. See *infra* Chapter 3, Parts III.B, IV.B and V.A.

²⁷¹ *M.S.S. v. Belgium and Greece*, App. No. 30696/09, 53 Eur. H.R. Rep. 2 (2011) (Sajó J., partly concurring and partly dissenting).

²⁷² *Id.*

²⁷³ Lourdes Peroni, *Vulnerable Groups: the Promise of an Emergent Concept in European Human Rights Convention Law*, STRASBOURG OBSERVERS, 10 February 2011, available at : <http://strasbourgoobservers.com/2011/02/10/m-s-s-v-belgium-and-greece-when-is-a-group-vulnerable/>

Lourdes and I also spent a few weeks as visiting scholars at the “Vulnerability and the Human Condition Initiative” at Emory Law School in Atlanta, USA.²⁷⁴ I was there from 16 February till 4 March 2012. The Vulnerability Initiative was established by Professor Martha Fineman. As mentioned above, Fineman views vulnerability as something that is universally and constantly inherent in human life. She emphasizes that vulnerability is *not* a condition that only applies to specific groups. The conversation that Lourdes and I had with Professor Fineman at Emory confirmed what we already thought: that the Court’s “vulnerable group” approach is in tension with Fineman’s vulnerability thesis.²⁷⁵

Case law selection and analysis

Turning now again to the question of how the ECtHR judgments were obtained, in our joint article Lourdes and I examined all ECtHR cases that make specific mention of “vulnerable group[s]”. On 1 March 2013, when we concluded our research, this amounted to approximately 20 judgments.²⁷⁶ For my other article about the concept of vulnerability more broadly in the jurisprudence of the Strasbourg Court (Chapter Five), the search for case law was more challenging, as there are many more relevant judgments. As of 1 September 2012, when I concluded the main part of the research for this article, typing in the terms “vulnerable” and “vulnerability” in Hudoc delivered approximately 600 hits.²⁷⁷ Articles 2 (the right to life), 3 (the prohibition of torture and inhuman and degrading treatment), 6 (the right to a fair trial) and 8 (the right to private and family life) are the most prevalent in this case law. I focused my search on Level-1 cases (being the cases that the Court itself classifies as the most important ones²⁷⁸), and examined other cases in so far as I found interesting references to them in the Court’s Level-1 cases, or in the bi-weekly discussions of Professor Brems’ research team.

As with the judgments about stereotypes, the case law analysis proceeded on the basis of close reading. In contrast to the analysis of the stereotyping cases, however, it was not necessary to be so focused on “missed chances” in the judgments to name vulnerability. Though there are undoubtedly

²⁷⁴ More information on the Vulnerability Initiative is available at: <http://web.gs.emory.edu/vulnerability/index.html>.

²⁷⁵ This is explored *infra* in Chapter 4.II.B and Chapter 5 generally.

²⁷⁶ This is only counting the cases where the Court itself refers to the concept of vulnerable groups (so excluding the cases where the term “vulnerable groups” is merely used in the “facts” part of the judgment or in the arguments of one of the parties.)

²⁷⁷ At the time of writing, less than a year later (June 2013), the amount of judgments has increased to over 750, which shows how popular the notion of vulnerability currently is.

²⁷⁸ Level 1 cases are described as “High importance: All judgments, decisions and advisory opinions not included in the Case Reports which make a significant contribution to the development, clarification or modification of its case-law, either generally or in relation to a particular State.”

cases in which the Court does not apply a vulnerability analysis where it could or even should have done so,²⁷⁹ my main focus was on *how* the Court renders the applicants' vulnerability and what kind of impact this has on the rest of the judgment. I read the texts of the judgments with questions in mind like: which factors make that the Court conceives of this particular applicant (or group of applicants) as vulnerable? Does the Court simply assume that the applicant is inherently vulnerable, or is it careful to distinguish what the situational factors are that construct the applicant's vulnerability? How does the Court's account of the applicant's vulnerability differ from the Government's account and the applicant's own account (and the account, if any, from the third party intervenor)? What consequence does the Court attach to a finding of vulnerability?

My analysis of the case law was informed by vulnerability theory. For our joint article on the concept of vulnerable groups (Chapter Four), Lourdes and I carried out a study of the theoretical literature on vulnerability, and found that vulnerability is an important concept in (bio)ethics as well as law.²⁸⁰ We decided to focus on the legal literature and, in that context, we refer to Fineman's thesis as one of several existing interpretations of vulnerability.²⁸¹ Undoubtedly, however, Fineman's thesis provides the most elaborate legal interpretation of the concept of vulnerability. Therefore, in my other article on vulnerability, which is entitled *A Quiet Revolution: Vulnerability in the European Court of Human Rights* (Chapter Five) and which analyses the concept of vulnerability more broadly in the ECtHR case law, Fineman's thesis figures as the central theoretical framework within which I assess the merits of the Strasbourg case law.²⁸² In fact, this PhD article will appear in a volume edited by Fineman herself and Anna Grear, entitled "*Vulnerability: Reflections on a New Ethical Foundation for Law and Politics*", which includes engagements with Fineman's thesis from several different areas of law and political philosophy.²⁸³

C) Feminist Legal Methods

²⁷⁹ See *infra* Chapter 4.III.B (the part entitled "blanks on the map", which discusses cases about Roma in which the Court did not reason in terms of group vulnerability).

²⁸⁰ See for an account of this literature study *infra* Chapter 4.II.

²⁸¹ See *infra* Chapter Four Part I A and B.

²⁸² To enable the case law analysis, Chapter Five will begin by setting out Fineman's thesis and by reflecting on how her thesis is enriched by human rights scholarship. See *infra* Chapter Five.II.

²⁸³ VULNERABILITY: REFLECTIONS ON A NEW ETHICAL FOUNDATION FOR LAW AND POLITICS (Martha A. Fineman & Anna Grear eds., Ashgate forthcoming 2013).

The present section will approach the question of research methods on a more conceptual and ideological level. That is to say, it will illuminate the role of feminist legal thought in this PhD. Underlying this thesis is namely a commitment to feminism, even though my focus is not directly on women's rights. Accordingly, this section seeks to show why feminist legal methods are pertinent for a research project like this one, which investigates the equality of non-dominant groups more broadly.

There are several varieties of feminist critique – liberal, cultural, radical and post-modern in orientation – and they have all found a place in human rights scholarship.²⁸⁴ Janet Halley provides the following description of the essential/minimum elements of feminism:

“First, to be feminism, a position must make a distinction between *m* and *f*. Different feminisms do this differently: some see men and women; some see male and female; some see masculine and feminine. While ‘men’ and ‘women’ will almost always be imagined as distinct human ‘groups’, the other paired terms can describe many different things: traits, narratives, introjects. . . . And secondly . . . a position must posit some kind of subordination as between *m* and *f*, in which *f* is the disadvantaged or subordinated element. At this point feminism is both descriptive and normative; it takes on the quality of a justice project while also becoming a subordination hypothesis. Feminism is feminism because, as between *m* and *f*, it carries a brief for *f*.”²⁸⁵

Cutting across different types of feminist legal theory is the central insight that law is not neutral or objective.²⁸⁶ Law is gendered. This is an insight that has been developed since the 1970's. The CEDAW Committee has formulated a useful working definition of gender:

“gender refers to socially constructed identities, attributes and roles for women and men and society's social and cultural meaning for these biological differences resulting in hierarchical relationships between women and men and in the distribution of power and rights favouring men and disadvantaging women.”²⁸⁷

²⁸⁴ See for discussion of these different feminist schools in relation to human rights law, e.g., Eva Brems, *Enemies or Allies? Feminism and Cultural Relativism as Dissident Voices in Human Rights Discourse*, 19 HUMAN RIGHTS QUARTERLY 136 (1997); DEMBOUR, *supra* note 73, at Ch. 7; Lacey, *supra* note 217; Françoise Tulkens, *Droits de l'homme, droits des femmes: les requérantes devant la Cour européenne des droits de l'homme*, in HUMAN RIGHTS – STRASBOURG VIEWS: LIBER AMICORUM LUCIUS WILDHABER, 423 (Lucius Caflisch et.al. eds, 2007).

²⁸⁵ Janet Halley, *Take a Break from Feminism?*, in GENDER AND HUMAN RIGHTS 57, 61 (Karen Knop ed., 2004).

²⁸⁶ See, e.g., Scales, *supra* note 10, at 10-13.

²⁸⁷ CEDAW-Committee, *General Recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of all Forms of Discrimination Against Women*, CEDAW/C/GC/28, 16 December 2010, ¶ 5.

What the concept of gender expresses is that “m” and “f” are socially and culturally constructed identities (not natural or biological givens) and that, moreover, these identities are constructed in such manner as to create hierarchical power relationship between them.²⁸⁸ Therefore, what the insight that law is gendered signifies, at a minimum, is that “law insists on a specific version of gender differentiation” which ultimately disadvantages “f”.²⁸⁹

From the 1980’s onward, feminist legal theory has steadily widened its inquiry to cover ever more issues and legal domains.²⁹⁰ Important for present purposes is that “the feminist gaze” has well expanded beyond the category of “f” to include other non-dominant groups and subjectivities.²⁹¹ First there came an insistence that women are differently situated, depending on their race, social background, physical ability, geographical location etc. This generated the concept of “intersectional discrimination,” meaning that discrimination can be based on a mixture of grounds, which interact to produce specific types of discrimination that cannot be captured by simply adding two types of discrimination together.²⁹² So, for example, the subordination that black women can experience is different than that of both white women and black men. Moreover, questions of gender identity and sexual orientation also came within the folds of feminist legal theory;²⁹³ just as questions of

²⁸⁸ Cf. the well-known definition of gender of Joan Wallach Scott: “gender is a constitutive element of social relationships based on perceived differences between the sexes, and gender is a primary way of signifying relationships of power.” Joan W. Scott, *Gender: A Useful Category of Historical Analysis*, THE AMERICAN HISTORICAL REVIEW 1067 (1986). See more recently: Joan W. Scott, *The Uses and Abuses of Gender*, 16 TIJDSCHRIFT VOOR GENDERSTUDIES 63 (2013).

²⁸⁹ Carol Smart, *The Woman of Legal Discourse*, in LAW, CRIME AND SEXUALITY: ESSAYS IN FEMINISM 191 (1995). Smart argues that law is also a “gendering strategy”, in the sense that, she claims, we must analyze law as “a process of producing fixed gender identities rather than simply as the application of law to previously gendered subjects.” *Id.* at 191

²⁹⁰ My purpose in this section is to describe the relevance of feminist legal theory for this thesis; the purpose is not to put forward a general historical overview of feminist legal theory. This field of scholarship is too complex – there is a too great multiplicity of viewpoints – for me to be able to do justice to it here. Other scholars have attempted a general account of the developments in feminist legal theory during the past four decades, see, e.g., Katherine T. Bartlett, *Feminist Legal Scholarship: A History Through the Lens of the California Law Review*, 100 CALIFORNIA LAW REVIEW 381 (2012).

²⁹¹ The term “the feminist gaze” comes from Brenda Cossman e.a., *Gender, Sexuality and Power: Is Feminism Enough?*, 12 COLUMBIA JOURNAL OF GENDER AND LAW 601, 625 (2003).

²⁹² The seminal article is Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Colour*, 43 STANFORD LAW REVIEW 1241 (1990-1991). In the European context see, e.g., EUROPEAN UNION NON-DISCRIMINATION LAW AND INTERSECTIONALITY. INVESTIGATING THE TRIANGLE OF RACIAL, GENDER AND DISABILITY DISCRIMINATION (Dagmar Schiek & Anna Lawson eds., 2011).

²⁹³ See, e.g., JANET HALLEY, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* (2006). Halley ultimately rejects feminist theory as an appropriate tool to analyze questions of gender identity and sexuality.

masculinities, such as how men suffer from gender-role stereotypes.²⁹⁴ Feminists started theorizing and challenging not only the hierarchical binary of “m”-“f”, but also other such binaries like able-disabled, citizen-noncitizen, white-black, heterosexual-homosexual. In doing so, gender is not the only analytical tool feminist legal scholars have developed to diagnose and redress inequality. Indeed, vulnerability is a good example of another concept that has been advanced in feminist quarters with this goal in mind.²⁹⁵

Accordingly, nowadays, “feminist scholarship speaks to . . . scholars not necessarily engaged in feminist scholarship”.²⁹⁶ Feminists do not only carry a brief for women,²⁹⁷ they carry a brief for all those who suffer from structural oppression. Feminist legal scholars have developed remarkably extensive and sophisticated approaches to equality. They have shown that law is constructed in a particular way that does not do justice to the experiences of women and other non-dominant subjects.²⁹⁸ Feminist justice projects come in many forms, some being primarily aimed at legal deconstruction, but they are generally aimed at transforming the law so that it does better justice to non-dominant groups (often women in particular). It is for these reasons that feminist legal scholarship is relevant for every research project that seeks to advance equality and improve the position of non-dominant groups, including this one.

Returning now to the question of method: what does it mean to “do” law as a feminist, what are feminist legal methods?²⁹⁹ In a classic law review article Katharine Bartlett has identified several feminist legal methods, which this thesis employs. First is the method of “looking beneath the surface of law to identify the gender implications of rules and the assumptions underlying them”.³⁰⁰ Writing in 1990, Bartlett called this “Asking the Woman Question”, but she indicated that this question was being converted into “the Question of the Excluded”.³⁰¹ This method entails posing questions like: what assumptions are made by law about those whom it effects? Whose point of view do these assumptions reflect? How might excluded viewpoints be taken into account?³⁰² These are indeed the kinds of questions that the next chapters pose. Second is what Bartlett terms “feminist practical reasoning”,

²⁹⁴ See, e.g., Nancy E. Dowd, *Masculinities and Feminist Legal Theory*, 23 WISCONSIN JOURNAL OF LAW GENDER & SOCIETY 201 (2008).

²⁹⁵ See, e.g., Martha Albertson Fineman, *Equality: Still Elusive After All These Years*, in GENDER EQUALITY: DIMENSIONS OF WOMEN’S EQUAL CITIZENSHIP 251 (Joanna Grossman & Linda McClain eds., 2009).

²⁹⁶ Bartlett, *supra* note 290, at 427.

²⁹⁷ Cf. Halley’s definition of gender, see text accompanying note 285.

²⁹⁸ See, e.g., J.E. GOLDSCHMIDT, WE NEED DIFFERENT STORIES 42-47 (W.E.J. Tjeenk Willink: Zwolle 1993).

²⁹⁹ Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARVARD LAW REVIEW 829, 830 (1990).

³⁰⁰ *Id.* at 843.

³⁰¹ *Id.* at 847-848.

³⁰² *Id.* at 848.

which essentially means reasoning that is sensitive to situation and context.³⁰³ This, too, is a method that will be applied in the next chapters.

These feminist methods of analysis are arguably pertinent in all areas of human rights law:³⁰⁴ not just specifically in the area of women's rights. The next chapters bear out this belief. Chapter Two, entitled *Toward an Anti-Stereotyping Approach for the European Court of Human Rights*, is indeed primarily focused on gender equality. Chapter Three, called *Judging Stereotypes: What the European Court of Human Rights Can Borrow from American and Canadian Equal Protection Law*, also contains many examples from gender discrimination cases although this chapter investigates the concept of stereotyping in general. The reason why these chapters refer so much to gender equality judgments is because the concept of stereotyping is furthest developed in this field. Chapters Four and Five, however, which concentrate on the concept of vulnerability as it relates to the case law of the ECtHR, contain far less gender-based analysis. The focus of these chapters is on non-dominant groups and vulnerability broadly. Still, to repeat, feminist legal methods are deployed in this entire thesis.

VI. Structure of this Dissertation³⁰⁵

Chapter Two, entitled *Toward an Anti-Stereotyping Approach for the European Court of Human Rights*, introduces the concept of stereotyping as a novel way of interpreting the ECtHR's case law on equality and non-discrimination. The central tenet of this chapter is that stereotypes are both cause and manifestation of the structural disadvantage and discrimination of certain groups of people. Focusing on the gender case law of the Strasbourg Court, this chapter explores what conception of equality the Court should embrace to adequately address the harmfulness of stereotypes. Since stereotypes are often the mechanisms that underlie discrimination, this chapter proposes ways in which the Strasbourg Court can integrate an anti-stereotyping approach in its legal reasoning. The proposed analysis consists of two phases; 'naming' and 'contesting' stereotypes. The whole argument is illustrated by *Konstantin Markin v. Russia* and *Rantsev v. Cyprus and Russia*, two recent cases in the area of gender equality. The

³⁰³ *Id.* at 849.

³⁰⁴ Indeed, I think that these methods are relevant in all areas of legal scholarship; not just human rights law scholarship.

³⁰⁵ The following descriptions are derived from the abstracts of the relevant PhD articles.

chapter concludes by reflecting on the feasibility of adopting an anti-stereotyping approach in light of the institutional position of the Court.

Chapter Three, entitled Judging Stereotypes: What the European Court of Human Rights Can Borrow from American and Canadian Equal Protection Law, builds on Chapter Two by offering a comparative analysis of the ways in which the concept of stereotype is used by the ECtHR, the U.S. Supreme Court and the Canadian Supreme Court. It argues that the Strasbourg Court can learn a great deal about the conceptualization of stereotypes and about the connections between stereotyping and discrimination from American and Canadian equal protection doctrine. Nevertheless, the comparison also exposes flaws in the application of the concept in all three jurisdictions under review. Contrary to what some critical legal scholars argue, the comparison shows that, at its best, anti-stereotyping reasoning goes beyond formal equality. A focus on stereotypes can expose and target the often hidden structures of inequality and discrimination. The Chapter ends by exploring what concrete lessons regarding stereotypes American and Canadian equal protection law holds for the Strasbourg Court.

Chapter Four, entitled Vulnerable Groups: the Promise of an Emergent Concept in European Human Rights Convention Law, shifts the inquiry to the concept of vulnerability. It draws attention to the fact that, without so far awakening scholarly attention, the concept of “vulnerable groups” is gaining momentum in the case law of the Strasbourg Court. The Chapter shows that the Court has thus far used this concept in cases concerning Roma, people with mental disabilities, people living with HIV and asylum seekers. Drawing on theoretical debates on vulnerability as well as on the Court’s case law, this Chapter offers a critical assessment of the concept. Reasoning in terms of vulnerable groups opens a number of possibilities, most notably, the opportunity to move closer to a more robust idea of equality. However, the concept also has some inherent difficulties. This Chapter argues for a reflective use of the concept and points out ways in which the Court can avoid its pitfalls. The Chapter finishes by reflecting on the institutional concerns associated with the Court’s use of group vulnerability.

Chapter Five, entitled A Quiet Revolution: Vulnerability in the European Court of Human Rights, widens the vulnerability inquiry. It examines the concept of vulnerability more broadly in the case law of the ECtHR, with the aim of discovering what potential the concept has to more fully and consistently include the specific concerns of marginalized people into the Court’s legal reasoning. To that end, this chapter deploys Martha Fineman’s vulnerability thesis as a central theoretical framework within which the qualities of the Strasbourg Court’s case law are assessed. After explicating the central tenets of this framework and exploring why the relationship between vulnerability and human rights law is complex,

this Chapter charts and critiques the ways in which the ECtHR reasons in terms of vulnerability. It then identifies vulnerability's effects in the Strasbourg case law and proceeds to take an institutional perspective to show that the Court is also vulnerable itself. The Chapter concludes with some reflections about the extent to which the ECtHR, in effect, adopts an approach consistent with the vulnerability thesis – and to what extent it has the possibility to do so.

Chapter Six forms the conclusion of this PhD thesis. It discusses the key findings as regards the concepts of stereotype and vulnerability separately, and reflects on how the Court can draw on these concepts to create a legal reasoning that is more sensitive to the demands of transformative equality. It then brings these concepts together and considers the tension and synergies between them. The conclusion closes by contemplating briefly on interesting topics for future research.

Preface Chapters Two and Three

The next two chapters contain two articles on the concept of stereotyping. The first article (Chapter Two), entitled “Toward an Anti-Stereotyping Approach for the European Court of Human Rights”, has been published in the *Human Rights Law Review* of December 2011. The research for this article was completed in September 2011. The text as it is reproduced here is the same text as was published in the *Human Rights Law Review*.

Since finishing and publishing this article, the Grand Chamber of the ECtHR has delivered two important judgments concerning stereotyping. These are *Aksu v. Turkey* (15 March 2012) and *Konstantin Markin v. Russia* (22 March 2012). Especially the *Konstantin Markin* case, concerning the refusal of the Russian authorities to grant extended parental leave to military servicemen while such leave is available for servicewomen, is relevant for Chapter Two as this chapter concerns gender stereotyping specifically. Indeed, Chapter Two contains an extensive discussion of the chamber judgment in this case, which had been delivered on 7 October 2010 (see *infra* Chapter 2.V.A).

I have opted to leave the *Human Rights Law Review* article intact and not re-write it for the present manuscript. This is not only for reasons of expediency. I have been able to discuss both the *Aksu* and the *Konstantin Markin* Grand Chamber judgments in Chapter Three, as the research for this chapter – which has been submitted to the *American Journal of Comparative Law* – was completed in May 2013. Furthermore, I have reflected extensively on the *Konstantin Markin* case elsewhere. In the first place, as was mentioned above in the Introduction, the Human Rights Centre of Ghent University submitted a third party intervention when the *Konstantin Markin* case went to the Grand Chamber.¹ Secondly, I wrote a chapter in *Konstantin Markin* for a volume on “rewriting judgments of the ECtHR” edited by Eva Brems.² As a result, I would not add anything original compared to my other work if I were to rewrite Chapter Two. What is more, although the Grand Chamber judgment is more sensitive to the stereotyping issue – of course I would like to think that the third party intervention of the Ghent Human Rights Centre made a difference in this respect! – the Grand Chamber judgment is not so different from the earlier judgment as to make the analysis in Chapter Two lose its bite.

¹ The third party intervention is available at: <http://www.ugent.be/re/publiekrecht/en/departement/human-rights/publications/amicus.pdf>

² Alexandra Timmer, *From Inclusion to Transformation: Rewriting Konstantin Markin v. Russia*, in *DIVERSITY AND EUROPEAN HUMAN RIGHTS: REWRITING JUDGMENTS OF THE ECHR* (Eva Brems, ed., 2012), p. 148-170.

As regards Chapter Three; the text that is reproduced here is the revised and re-submitted version which I have sent to the *American Journal of Comparative Law*.

2. Toward an Anti-Stereotyping Approach for the European Court of Human Rights

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Abstract

The central tenet of this article is that stereotypes are both cause and manifestation of the structural disadvantage and discrimination of certain groups of people. Focusing on the gender case law of the European Court of Human Rights, this article explores what conception of equality the Court should embrace to adequately address the harmfulness of stereotypes. Since stereotypes are often the mechanisms that underlie discrimination, this article advances an anti-stereotyping approach that the Court could employ in its rulings. The proposed analysis consists of two phases; 'naming' and 'contesting' stereotypes. The whole argument is illustrated by Konstantin Markin v Russia and Rantsev v Cyprus and Russia, two recent cases in the area of gender equality.

I. Introduction

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There are ‘no grounds for complacency’ as regards the protection of human rights in Europe.¹ With these words Thomas Hammarberg, the Council of Europe Commissioner for Human Rights, calls attention to the persisting discrimination and marginalization of – among others – women, minorities and people with a disability. The question is how to tackle these systemic equality- and discrimination-problems within the European legal framework. Part of the answer lies with the European Court of Human Rights (‘ECtHR’ or ‘the Court’) – which is, after all, widely celebrated as the most advanced human rights protection body.² This article explores the potential of the case law of that Court to tackle structural equality problems.

My point of departure is that the Court and its commentators should now focus on contesting the mechanisms that underlie inequality and discrimination, as legally mandated overt discrimination has largely disappeared in Europe. These mechanisms are often hidden from view and are connected to our unconscious mental processes.³ Those elusive mechanisms are called stereotypes. The central tenet of this article is that stereotypes are both cause and manifestation of the structural disadvantage and discrimination of certain groups of people. From this basis I develop the argument that the Strasbourg Court needs to recognise and address stereotyping as a structural cause of discrimination. This general argument is illustrated and substantiated with a specific focus on *gender* stereotypes. Thus, I draw mainly on the Court’s gender case law, but at times I use examples from other areas of its discrimination case law.

Stereotypes are, in short, widely accepted beliefs about groups of people. The case law of the ECtHR provides us with plenty of examples, like: women have ‘a special social role associated with motherhood’;⁴ Muslim women are oppressed;⁵ and homosexuals have only cursory relationships.⁶

¹ Hammarberg, *Human rights in Europe: no grounds for complacency. Viewpoints by Thomas Hammarberg Council of Europe Commissioner for Human Rights* (Strasbourg: Council of Europe Publishing, 2011).

² Goldhaber, *A People’s History of the European Court of Human Rights* (New Brunswick: Rutgers University Press, 2007) at 189-90 (and the literature quoted there).

³ There is a rich body of American scholarship devoted to unconscious bias and its implications for equal protection law. Seminal articles include Lawrence, ‘The Id the Ego, and Equal Protection: Reckoning with Unconscious Racism’, (1987) 39 *Stanford Law Review* 317; Hamilton Krieger, ‘The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity’, (1995) 47 *Stanford Law Review* 1161.

⁴ *Konstantin Markin v Russia* Application No 30078/06, Merits, 7 October 2010, at para 19 (this stereotype was advocated by the Russian Constitutional Court in their judgment in the *Konstantin Markin* case).

⁵ Compare *Dahlab v Switzerland* 2001-V; and *Leyla Şahin v Turkey* 2005-XI; 41 EHRR 8. The stereotype that Muslim women are oppressed is implicitly advocated by the Court in these judgments; see on this topic, e.g., Evans, ‘The “Islamic Scarf” in the European Court of Human Rights’ (2006) 7 *Melbourne Journal of International Law* 52.

⁶ This stereotype was refuted by the Court in *Schalk and Kopf v Austria* Application No 30141/04, Merits, 24 June 2010, at para 99: ‘the Court would start from the premise that same-sex couples are just as capable as different-sex couples of entering into stable committed relationships. Consequently, they are in a relevantly similar situation

Stereotypes such as these should be contested because they restrict people to supposed group characteristics, thus impairing their dignity and personal autonomy, as well as denying them certain rights on this basis. Gender stereotypes form the ‘fortress of our tradition’ that women all too often cannot escape.⁷ If we want to realise women’s human rights, we must challenge gender stereotypes.⁸

Unfortunately the Court’s approach to stereotyping has been rather piecemeal so far. Only recently has the Court started to recognize stereotypes as one of the structural causes holding back the emancipation of disadvantaged groups.⁹ Various other legal systems, however, have recognized that structural change requires combating stereotypes.¹⁰ It is not the purpose of this article to offer a comparative perspective on the case law of the ECtHR, yet it will become clear that this project is grounded in the judicial and scholarly work on gender stereotyping that has been done elsewhere. Specifically, my project is inspired by the work of the CEDAW Committee and by American, Canadian and South African case law and scholarship. In those jurisdictions, in varying ways, stereotyping has been a central harm that equal protection law has sought to address.

Briefly put, this article seeks to advance a legal methodology – drawing on U.S. legal literature, I call it an ‘anti-stereotyping approach’¹¹ – that uncovers and contests the patterns that lead to structural discrimination. This anti-stereotyping approach is a first attempt at creating a tool that the ECtHR could use to improve its reasoning to more fully protect specifically disadvantaged groups against stereotyping and other forms of structural discrimination. After this introduction, Part II describes the state of affairs in the Court’s discrimination jurisprudence and places this article in a wider set of developments concerning the judicial approach to equality. Part III gives an account of stereotypes and their harm and elucidates the legal significance of stereotypes. Part IV sets forth my anti-stereotyping analysis, which is specifically aimed at the ECtHR. The analysis will consist of two phases: namely ‘naming’ and

to a different-sex couple as regards their need for legal recognition and protection of their relationship.’ Of course, stereotypes do not only surface in the gender context. Think of the case of *Aksu v Turkey* concerning a Turkish government-sponsored dictionary and another government-sponsored book that included suggestions that Roma are stingy, fraudulent and aggressive. *Aksu v Turkey* Application No 4149/04 and 41029/04, Merits, 27 July 2010.

⁷ Lippmann, *Public Opinion* (BN Publishing, 2007 (first published 1922)) at 36.

⁸ This is also the central message of Cook and Cusack, *Gender Stereotyping: Transnational Legal Perspectives* (Philadelphia: University of Pennsylvania Press, 2010).

⁹ See *infra* Part 2.

¹⁰ Examples are the Inter-American, the South African and the Canadian legal systems. Paradigmatic cases include Inter-American Commission on Human Rights Case 11.625, *Morales de Sierra v Guatemala* Report No 4/01 (2001); 9 IHRR 190 (2002); South African Constitutional Court, *Minister of Home Affairs and Another v Fourie and Another* [2005], CCT 06/04; and Canadian Supreme Court, *R v Ewanchuk* [1999] 1 SCR 330 (L’Heureux-Dubé J. concurring). For a discussion of these and other cases, see Cook and Cusack, *supra* note 8.

¹¹ Franklin, ‘The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law’, (2010) 85 *New York University Law Review* 83.

‘contesting’. This analysis is meant to be suggestive rather than definitive: the aim is to raise the kinds of questions that the Court needs to ask in order to dismantle harmful gender stereotypes and to show how the Court could incorporate an anti-stereotyping approach in its legal reasoning. Part V illustrates this analysis with two recent gender cases: *Konstantin Markin v Russia* and *Rantsev v Cyprus and Russia*,¹² and puts forward some suggestions concerning other areas of the Court’s gender case law that would benefit in particular from the approach this article advocates.

II. Developing equality

There have been significant developments within the legal approach to equality and discrimination in the past decades. Increasingly, equality is approached holistically. The focus in this article lies on the developments in the case law of the ECtHR, nonetheless these developments are reflective of a broader legal trend. The purpose of this part is to locate my anti-stereotyping argument within a broader set of developments and, by quickly taking the reader through the anti-discrimination case law of the Court, to lay the groundwork for the anti-stereotyping analysis outlined in Part IV.

During the first decades of its existence, the ECtHR saw discrimination solely through a lens of *formal equality*. The hallmark of such an approach, sometimes called *de jure* equality, is that persons placed in similar situations must be treated in an equal manner and that no distinction can be made on a number of grounds of discrimination such as race and sex, without reasonable justification. In brief: women have the same rights as men. A landmark case in this context was *Abdulaziz, Cabales and Balkandi v the United Kingdom* (the ‘ABC-case’) from 1985.¹³ The case concerned the immigration rules of the United Kingdom which made a distinction between male and female immigrants: women whose spouses were legally resident in the UK were allowed to join their partner, while the reverse was not allowed. The United Kingdom submitted that this rule was intended to protect the domestic labour market: men would have a greater impact on the labour market than women.¹⁴ The Court judged that this amounted to discrimination on the ground of sex and concluded that this was a violation of the

¹² *Konstantin Markin v Russia* Application No 30078/06, Merits, 7 October 2010; *Rantsev v Cyprus and Russia* Application No 25965/04, Merits, 7 January 2010.

¹³ *Abdulaziz, Cabales, and Balkandali v United Kingdom* A 94 (1985); 7 EHRR 471.

¹⁴ *Ibid.* at 75. The idea that men have a greater impact on the labour market is of course also based on a stereotype. In this case the Court solves the issue with a call upon formal equality.

Convention. Importantly, this was the first case in which the Court laid down the rule that when a State makes a distinction on the grounds of sex, the rule or practice in question must be subjected to an intensive scrutiny: the State must be able to advance '*very weighty reasons*' for the distinction.¹⁵

Although formal equality serves its purposes, from a gender perspective it has serious shortcomings. These shortcomings are well documented in feminist legal literature. Feminists have pointed out that when the aim is to give women the same rights as men, the frame of reference is still masculine. This is problematic in several ways. What to do with issues in which women and men are not the same, like pregnancy? Why would women actually have to adapt to a masculine norm?¹⁶ And what to do with intersectional discrimination; meaning discrimination that cannot be reduced to just one ground but which is based on a combination of identities?¹⁷ In the end, formal equality is often too formalistic: such an approach puts too much emphasis on technical-legal concepts and does not take the historical and social reality of women and other non-dominant or vulnerable groups enough into account.¹⁸

Undoubtedly influenced by all the critique on formal equality, the Court has started to develop a *substantive conception of equality*.¹⁹ This approach, also called *de facto* equality, takes as its starting point the reality of a rule or practice as it is experienced by a disadvantaged group. The question then becomes whether the effect of a rule is discriminatory, not whether a distinction has been made between different groups. The Court has slowly become aware that neutrally formulated rules can have a disproportionately burdening effect on vulnerable social groups. In other words; in the real world, neutral rules can be discriminatory. A discriminatory intent is not a pre-condition for a finding of discrimination: discrimination can arise from a *de facto* situation. This understanding has gradually been embraced by the Court, but is most clearly articulated by the Grand Chamber in *D.H. and Others v Czech Republic* in 2007, incidentally a case which did not concern gender discrimination but segregation of Roma children in Czech schools. In that case the Court even suggested that, sometimes, positive action

¹⁵ Ibid. at 78.

¹⁶ See, e.g., West, 'The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory', (2000) 15 *Wisconsin Women's Law Journal* 149.

¹⁷ A seminal article is Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color', (1990-1991) 43 *Stanford Law Review* 1241.

¹⁸ Nussbaum, 'Foreword: Constitutions and Capabilities: 'Perception' Against Lofty Formalism', (2007) 121 *Harvard Law Review* 4.

¹⁹ See generally O'Connell, 'Cinderella Comes to the Ball: Art 14 and the Right to Non-Discrimination in the ECHR', (2009) 29 *Legal Studies* 211.

is expected from the authorities, in order to correct factual inequalities.²⁰ Another aspect of a more substantive interpretation of equality is the awareness that different situations should not be treated equally, if the goal is to achieve a fair result.²¹

However valuable an approach is that embraces substantive equality; even this approach has its limits. By emphasizing the effects of a particular rule, the underlying structural causes of exclusion are not necessarily addressed and are often left untouched. The struggle against structural forms of discrimination is referred to as transformative equality by certain authors.²² Equality as transformation is an ambitious project: it challenges the deeply ingrained gender roles and gendered ideology on which society is based. States are expected to make a radical reconsideration of those aspects of their legal, social and economic culture that hamper the equality and human dignity of women.²³ The aim is to disrupt the hierarchical legal and social status quo.²⁴ For the sake of terminological clarity, let me explain that this article recognizes that what is labelled here as transformative equality, many scholars would actually classify as substantive equality.²⁵ The reason this article employs a rather narrow conception of substantive equality and makes a distinction between substantive and transformative equality in this way, is that this corresponds better with the Court's current equality jurisprudence. The Court's approach to substantive equality is characterized by an emphasis on (and an increasing willingness to embrace) positive equality duties.²⁶ This approach is a step in the right direction, but it does not necessarily ensure that the root causes of gendered disadvantage are addressed. If the Court wants to

²⁰ *D.H. and Others v Czech Republic* (2007); 47 EHRR 3, at para 175.

²¹ See *Thlimmenos v Greece* 2000-IV; 31 EHRR 15.

²² Bonthuys, 'Institutional Openness and Resistance to Feminist Arguments: the Example of the South African Constitutional Court', (2008) 20 *Canadian Journal of Woman and the Law* 1 at 35; Cook and Cusack, *supra* n 8 at 6 and 8; Fredman, 'Beyond the Dichotomy of Formal and Substantive Equality: Towards a New Definition of Equal Rights', in Boerefijn et al. (eds), *Temporary special measures. Accelerating de facto equality of women under Article 4(1) UN Convention on the Elimination of all forms of Discrimination Against Women* (Antwerp: Intersentia, 2003) 111 at 115; Holtmaat and Naber, *Women's Human Rights and Culture: From Deadlock to Dialogue* (Antwerp: Intersentia, 2011) at 26-7.

²³ Holtmaat, 'Article 5 CEDAW', in Freeman et al. (eds), *The Convention on the Elimination of All Forms of Discrimination against Women: A Commentary* (Oxford: Oxford University Press, forthcoming 2011).

²⁴ Bonthuys, *supra* n 22 at 35.

²⁵ See, e.g., Albertyn and Goldblatt, 'Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality', (1998) 14 *South African Journal on Human Rights* 248 at 250. ('A commitment to substantive equality involves examining the context of an alleged rights violation and its relationship to systemic forms of domination within a society. It addresses structural and entrenched disadvantage at the same time as it aspires to maximise human development.').

²⁶ A good example is *Opuz v Turkey* Application No 33401/02, Merits, 9 June 2009. See also Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford: Oxford University Press, 2008) at 186.

go to the roots of structural gender discrimination it should dismantle gender stereotypes, as well as be willing to go into the issue of States' positive obligations on the terrain of equality.

There are a few indications in the recent case law of the ECtHR that the Court is willing to embrace a conception of transformative equality based on an anti-stereotyping approach, though let it be noted that the Court has not yet applied this idea in a gender case (at least not expressly²⁷). None of the cases that are about to be mentioned concern gender. In *Alajos Kiss v Hungary* (2010) the Court speaks for the first time explicitly about the stereotypes from which people with intellectual disabilities suffer.²⁸ In that judgment, the Court shows itself conscious of the impact of historical discrimination. It seems that the Court suggests a general framework within which the 'very weighty reasons'-test needs to be applied: a distinction requires very weighty reasons, says the Court, if it concerns certain groups in society that are particularly vulnerable due to significant past discrimination.²⁹ This approach to disability-based discrimination is confirmed in *Kiyutin v Russia*, a case concerning a HIV-positive applicant.³⁰ In this case the Court makes a real effort to address the sources of prejudice against people living with HIV. The Court acknowledges that, as a result of ignorance of how the disease spreads and links to already existing racism, homophobia and misogyny, people living with HIV are subject to intensely harmful stigmatization and therefore a particularly vulnerable social group.³¹ The dissenters in *Aksu v Turkey* (incidentally the same Chamber that decided *Alajos Kiss*) continue this line in a case that concerns discrimination of Roma.³² This is the first time that (part of) the Court expands on the concept of stereotypes: 'Stereotypes are ready-made opinions that focus on peculiarities, and prejudices are preconceived ideas that lead to bias: they are dangerous because they reflect or even induce an implicit discrimination.'³³

Promising as these cases are, a lot of work remains to be done before the ECtHR will take transformative equality on board. This is where this project is positioned. However, it is important to stress that the anti-stereotyping approach is not meant to substitute all other approaches to equality and discrimination. Exclusion on the basis of gender can affect both men and women, takes place in

²⁷ Though *Konstantin Markin* comes close. *Konstantin Markin v Russia* Application No 30078/06, Merits, 7 October 2010: see *infra* Part 4 and 5. See also *Petrovic v Austria* 1998-II; 33 EHRR 307 (Bernhardt J. and Spielmann J., dissenting).

²⁸ *Alajos Kiss v Hungary* Application No 38832/06, Merits, 20 May 2010.

²⁹ *Ibid.* at para 42.

³⁰ *Kiyutin v Russia* Application No 2700/10, Merits, 10 March 2011.

³¹ *Ibid.* at para 64.

³² *Aksu v Turkey* Application No 4149/04 and 41029/04, Merits, 27 July 2010. At the time of writing, this case has been referred to the Grand Chamber.

³³ *Ibid.* at para 2 (Tulkens J., Tsotsoria J. and Pardalos J., dissenting).

many different situations, and may take many different forms. Different methods are therefore required to combat gender exclusion and disadvantage. The three forms of equality (formal, substantial and transformative equality) are all useful, depending on the situation, and must coexist.³⁴ In order to address all aspects of inequality based on gender, we need a holistic approach.³⁵

III. (Gender) Stereotypes: meaning and adjudication

In this part, the basics of stereotypes will be briefly set forward. Unfortunately, this will by force be a superficial account, as it is nearly impossible to do justice to the vast deal of (empirical) research that has been done into stereotypes by psychologists. To start, here are some remarks about stereotypes in general.

The most basic definition of stereotypes is that they are beliefs about the characteristics of groups of people.³⁶ According to standard psychology-texts, stereotypes can be both negative ('women are weak') and positive ('women are caring'), but they are predominantly negative.³⁷ However, Zanita Fenton argues that 'positive' stereotypes also have negative consequences, because what is constructed as positive depends on the point of view of the observer. Besides, while a stereotype does not have to be correct for a particular person, it does force that individual in a particular role or position, either ideologically or in reality.³⁸

Individuals employ stereotypes to simplify and make understandable the world around them, and as such stereotypes play an important and legitimate role in our lives.³⁹ But at the same time stereotypes are not neutral; they are not merely a short cut to reality.⁴⁰ They are cultural phenomena: they are the social ideas and preconceptions that exist about a particular group. Stereotypes create 'in' -

³⁴ Holtmaat and Naber, *supra* n 22 at 27.

³⁵ *Ibid.*

³⁶ Stangor, 'Volume Overview' in Stangor (ed), *Stereotypes and Prejudice: Essential Readings* (Philadelphia: Psychology Press, 2000) 1 at 5.

³⁷ See, e.g., Stangor, 'The Study of Stereotyping, Prejudice and Discrimination Within Social Psychology: A Quick History of Theory and Research', in Nelson (ed), *Handbook of Prejudice, Stereotyping and Discrimination* (New York: Psychology Press, 2009) 1 at 2.

³⁸ Fenton, 'Domestic Violence in Black and White: Racialized Gender Stereotypes in Gender Violence', (1998-1999) 8 *Columbia Journal of Gender and Law* 1 at 13.

³⁹ Stangor and Schaller, 'Stereotypes as Individual and Collective Representations', in Stangor (ed) *Stereotypes and Prejudice: Essential Readings* (Philadelphia: Psychology Press, 2000) 64 at 73-5. It was Walter Lippmann who first found the reason we stereotype in 'economy of effort'. Lippmann, *supra* n 7 at 34-5.

⁴⁰ Lippmann, *supra* n 7 at 36.

and 'out-groups': us versus them. This also serves a function, as this way we feel better about ourselves because we feel like we belong.⁴¹

The rest of this paragraph will address gender stereotypes in particular. Gender stereotypes are often rooted in our subconscious. In that case, we are not aware that we base our actions on them. In the words of Rikki Holtmaat: 'Stereotypes tend to fixate gender identities and gender roles and make them appear as real, universal, eternal, natural, essential and/or unchangeable.'⁴² To put it differently: when there is a stereotype at play, people tend not to ask further questions, because stereotypes make gender patterns seem self-evident. Stereotypes make us lazy and blind us to gender inequality.

The harm of gender stereotypes is that they tie both men and women down to a particular identity. They place a certain mould on individuals, independent of what they are capable of, experience or desire. By means of gender stereotypes, men and women are not seen not as individuals, but are by default judged on the basis of a gender-group membership. It is important to emphasise that stereotypes often serve to maintain existing power relationships; they are control mechanisms. Stereotypes uphold a symbolic and real hierarchy between 'us' and 'them'.⁴³

Thus, stereotypes have important tangible and intangible effects. Based on the work of Nancy Fraser, Rebecca Cook and Simone Cusack call these recognition and distribution-effects.⁴⁴ Fraser considers misrecognition to be a cultural injustice. Misrecognition is a status injury, it is social subordination: 'to be denied the status of a full partner in social interaction, as a consequence of institutionalized patterns of cultural value that constitute one as comparatively unworthy of respect and esteem.'⁴⁵ In this context, Cook and Cusack observe that gender stereotypes can harm women by degrading them, diminishing their human dignity or otherwise marginalizing them.⁴⁶ Distribution-effects concern the distribution of resources. It refers to socio-economic justice; the question is whether public goods are fairly allocated. Cook and Cusack identify two sorts of distribution-effects: women can be

⁴¹ Fein and Spencer, 'Prejudice as Self-Image Maintenance: Affirming the Self Through Derogating Others', in Stangor (ed) *Stereotypes and Prejudice: Essential Readings* (Philadelphia: Psychology Press, 2000) 172.

⁴² Holtmaat and Naber, supra n 22 at 57.

⁴³ Fenton, supra n 38 at 11-17.

⁴⁴ Cook and Cusack, supra n 8 at 59-68. See also Fraser, *Justice Interruptus: Critical Reflections on the 'Postsocialist' Condition* (New York, Routledge, 1997); Fraser, 'Rethinking Recognition', (May-June 2000) *New Left Review* 107; Fraser and Honneth, *Redistribution or Recognition? A Political-Philosophical Exchange* (London and New York: Verso, 2003).

⁴⁵ Fraser, 'Rethinking Recognition', (May-June 2000) *New Left Review* 107 at 113-14.

⁴⁶ Cook and Cusack, supra n 8 at 63-8.

denied a benefit on the basis of a gender stereotype,⁴⁷ or saddled with a burden.⁴⁸ Recognition and distribution are closely linked. Sometimes that link is causal, as when the lack of the one leads to a lack of the other. But that is not necessarily the case.

However, an important category of harm is still lacking here which deserves to be mentioned separately: psychological effects. People who belong to groups who are stereotyped are usually aware of the bad reputation of their group, and this creates diverse problems. They report psychological distress, unhappiness and depression.⁴⁹ In addition, stereotypes can constrain behaviour and make people underachieve. This occurs when people experience ‘stereotype threat’: the pressure that people feel not to conform to a certain (negative) stereotype for fear that they will be judged or treated in terms of it.⁵⁰ Stereotype threat causes anxiety, which in turn causes underperformance. Another effect of stereotypes is that people feel obliged to ‘cover’, conceptualized by Kenji Yoshino as a demand to hide a certain disfavoured identity.⁵¹

To enumerate all the harmful effects of stereotypes is clearly beyond the scope of this Article. What will be clear from the foregoing is that the Court will have to make a careful case by case assessment of the gender stereotypes that are at play, and their effects.

States’ international commitment to gender equality cannot be reached without addressing the persistence of harmful gender stereotyping. This is explicitly recognized in the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). The legal basis for the obligation to address gender stereotypes is found in several binding international documents,⁵² but is perhaps most

⁴⁷ See for example the case of Leyla Şahin against Turkey. That case concerned a student who was denied entrance to the university as long as she refused to take off her headscarf. *Leyla Şahin v Turkey* 2005-XI; 41 EHRR 8.

⁴⁸ An example of a case in which a stereotype imposed a burden on a woman is *Petrovic v Austria*, concerning parental leave allowance. Austrian law provided that only mothers were entitled to receive such payments. By denying this form of social benefits to fathers, and thus enforcing the traditional gender role model, Austria imposed the task of looking after the children on mothers. *Petrovic v Austria* 1998-II; 33 EHRR 307. See generally Cook and Cusack, *supra* n 8 at 61-3.

⁴⁹ Stangor, *supra* n 37 at 7, and the literature quoted there.

⁵⁰ Steele, *Whistling Vivaldi. And Other Clues to How Stereotypes Affect Us* (New York and London: W.W. Norton & Company, 2010) at 89.

⁵¹ Yoshino, *Covering: The Hidden Assault on Our Civil Rights* (New York, Random House, 2006). Covering demands stood central in quite a number of ECtHR cases. (In)famous are the headscarf-cases: *Dahlab v Switzerland* 2001-V; *Leyla Şahin v Turkey* 2005-XI; 41 EHRR 8. *Dogru v France*, Application No 27058/05, Merits, 4 December 2008. See also *Alekseyev v Russia*, Application No 4916/07; 25924/08; 14599/09, Merits, 21 October 2010 (concerning a prohibition on gay marches in Moscow).

⁵² I am indebted to Simone Cusack for making this point. See, apart from the CEDAW Convention, Articles 7(e) and 8(b), Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women 1994

prominent in CEDAW's Articles 2(f) and 5. Article 5(a) CEDAW stipulates that States take all appropriate measures to: 'modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.' The CEDAW Committee has clarified the link between the obligation to address gender stereotypes and the problem of structural discrimination. In General Recommendation No. 25 the Committee observes: 'States parties' obligation is to address prevailing gender relations and the persistence of gender-based stereotypes that affect women not only through individual acts by individuals but also in law, and legal and societal structures and institutions.'⁵³

That this is also important within the context of the ECtHR is clear: all States of the Council of Europe are party to CEDAW and none have made a reservation to Article 5(a).⁵⁴ The ECtHR stressed the importance of CEDAW in a recent ruling, *Opuz v Turkey*: 'when considering the definition and scope of discrimination against women, in addition to the more general meaning of discrimination as determined in its case-law . . . the Court has to have regard to the provisions of more specialised legal instruments', such as CEDAW.⁵⁵

This brings me to the crucial question of the role of the Court. What can the ECtHR do to address, and ultimately help to eliminate, harmful gender stereotypes? It is suggested that the Court's role is twofold: in the first place the Court should not rely on harmful (gender) stereotypes in its own reasoning and,⁵⁶ secondly, the Court should name gender stereotyping whenever it occurs on a national level and proceed against it as a particularly damaging form of discrimination. The rest of this article

(*Convention of Belém do Pará*), (1994) 22 ILM 1534; Articles 2(2), and 4(d), Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa 2003; Article 8(1)b, Convention on the Rights of Persons with Disabilities 2006, available at: <http://www.un.org/disabilities/convention/conventionfull.shtml> [last accessed 22 August 2011], (Article 8(1)b discusses compounded stereotyping, including on the basis of sex); Committee on Economic Social and Cultural Rights, General Comment No. 16: The equal rights of men and women to the enjoyment of all economic, social and cultural rights (Article 3), 11 August 2005, E/C.12/2005/4, at para 11 and 14.

⁵³ CEDAW Committee, General Recommendation No 25: Article 4(1), Temporary Special Measures, A/59/38 (2004); 11 IHRR 909 (2004) at para 7.

⁵⁴ The list of reservations to CEDAW is available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en#6 [last accessed 22 August 2011].

⁵⁵ *Opuz v Turkey* Application No 33401/02, Merits, 9 June 2009, at para 185 and see also para 164.

⁵⁶ For an example of judicial reasoning that wrongfully relied on gender stereotypes and a condemnation of the CEDAW Committee thereof, see *Karen Tayag Vertido v The Philippines* (18/08), CEDAW/C/46/D/18/2008 (2010). See also on this topic Cusack and Timmer, 'Gender Stereotyping in Rape Cases: The CEDAW Committee's Decision in *Vertido v the Philippines*', (2011) 11 *Human Rights Law Review* 329.

focuses on that second aspect of the Court's role. To be clear: this article does not propose that judges should try to eradicate all stereotypes from society. That would be neither feasible nor desirable, since some stereotypes do fulfil a legitimate function (namely making the countless amount of information we have to process in day-to-day life manageable) and, moreover, since it is inevitable that law relies on generalizations. However, there is a line between permissible generalizations and harmful stereotypes. When a gender stereotype halts the emancipation process States are under an obligation to address it on the basis of arts 2(f), 5(a) CEDAW, and then, this article argues, the Court should not let the use of such a gender stereotype pass by.⁵⁷

What does that mean that the Court can do concretely? On a practical level, the key role for judges seems to be to ensure that individuals, companies or States do not act on harmful stereotypes.⁵⁸ Thus, the ECtHR can oblige States to individualize rules or practices, rather than to categorize and exclude on the basis of group membership by applying so-called 'blanket restrictions' on fundamental rights.⁵⁹ On a more conceptual level, the Court can play a role in changing the way we speak – and thereby influence the way we think⁶⁰ – about stereotypes and gender ideology. The following Part explicates how the Court can make sure that States do not discriminate on the basis of harmful gender stereotypes.

IV. Analysis: towards an anti-stereotyping approach for the ECtHR

A) *Setting the stage*

What could a judicial analysis that revolves around the anti-stereotyping principle look like in gender equality cases? This part will propose an anti-stereotyping analysis in two stages: in the first place

⁵⁷ Whether a stereotype halts the emancipation process depends on the context in which the stereotype is used. Some scholars argue that stereotypes can have positive uses and that we should therefore take pause before denouncing them. See for example Suk, 'Are Gender Stereotypes Bad for Women? Rethinking Antidiscrimination Law and Work-Family Conflict', (2010) 110 *Columbia Law Review* 1. For this reason, the Court will have to assess stereotypes and their impact on a case-by-case basis. See *infra* Part 4B.

⁵⁸ Stangor, *supra* n 49 at 11.

⁵⁹ The Court has in several cases condemned the use of blanket restrictions and applied the principle that rules should leave room for an individualized assessment. See *Hirst v United Kingdom (No 2.)* 2005-IX; 42 EHRR 41; *Tănase v Moldova*, Application No. 7/08, Merits, 27 April 2010; *Alajos Kiss v Hungary* Application No 38832/06, Merits, 20 May 2010; *Kiyutin v Russia* Application No 2700/10, Merits, 10 March 2011.

⁶⁰ Cf. Boroditsky, 'Lost in Translation', *Wall Street Journal*, 24 July 2010.

gender stereotypes should be named,⁶¹ and subsequently they must be contested. By ‘naming’ I mean that the Court must determine the actual role of gender stereotypes in the context of a particular case. It will become clear that this analysis interprets factual context broadly. Under the header of ‘contesting’ I describe how the Court should proceed against gender stereotypes in its legal reasoning.

Before covering the actual analysis, let me clarify that in the second stage of the analysis I utilize the model of judicial review that Janneke Gerards has developed for equal treatment cases, based on the case law of the ECtHR and several other courts.⁶² She has created a beautifully condensed account of how judges can apply the equality norm, which can be applied in cases of both de jure and de facto unequal treatment. To avoid repetitive scholarship and in order to make my anti-stereotyping analysis as concise as possible, it is expedient to utilize Gerards’ model as a springboard.

Gerards suggests that the judicial review of the equality norm must be carried out in three phases. First there is a pre-phase in which the intensity of the review must be determined: strict scrutiny (the very weighty reasons-test), intermediate review or marginal review? Theoretically,⁶³ this step is of less importance for gender cases at the ECtHR because the Court has already ruled that distinctions based on sex require an intensive review.⁶⁴ Then in the next phase the Court must determine whether there is a sufficient cause of action; whether there has actually been an instance of unequal treatment that requires justification.⁶⁵ To assess this, the official line of the ECtHR is that a comparability test should be carried out: ‘discrimination means treating differently, without an objective and reasonable justification, persons in relevantly similar situations’.⁶⁶ The comparability test seems to have become less important now that the Court adjudicates indirect discrimination cases increasingly often and, anyway, the Court almost never pays explicit attention to the comparability in cases that concern ‘suspect’ classifications (such as sex).⁶⁷ Instead of a comparability test, Gerards argues for a ‘disadvantage test’, which argument this article supports. The disadvantage test means that the complainant must prove that a rule or practice disadvantaged her compared to another person or group of persons.⁶⁸ If it has been proven that the applicant suffered a genuine disadvantage, then the State must be able to justify this. This brings us to the final phase of Gerards’ test, when the Court must

⁶¹ Cook and Cusack also argue that the first step is to name stereotypes. Cook and Cusack, *supra* n 8, chapter two.

⁶² Gerards, *Judicial Review in Equal Treatment Cases* (Leiden and Boston: Martinus Nijhoff, 2005).

⁶³ See *infra* Part 4C for some reflections on how the Court applies this test in practice.

⁶⁴ See *supra* Part 2.

⁶⁵ Gerards, *supra* n 62 at 660.

⁶⁶ *D.H. and Others v Czech Republic* (2007); 47 EHRR 3, at para 175.

⁶⁷ Gerards, *supra* n 62 at 130-33.

⁶⁸ *Ibid.* at 669-75.

determine whether there is a justification for the distinction. The ECtHR does so on the basis of two questions: does the distinction pursue a legitimate aim and is there proportionality between the means employed and the aim sought to be realized?

Now that Gerards' model of judicial review in equal treatment cases is briefly set forward, it is time to introduce my anti-stereotyping analysis.

B) First phase: naming

The main question that the Court has to consider is whether a rule or practice is based on harmful gender stereotypes.⁶⁹ Cook and Cusack argue that '[n]aming wrongful gender stereotyping . . . is central to the effectiveness of efforts to eliminate this practice. Unless wrongful gender stereotyping is diagnosed as a social harm, it will not be possible to determine its treatment and bring about its elimination.'⁷⁰ In response to discrimination case law of the Supreme Court of Canada, Margot Young has made the point that the more entrenched a (gender) stereotype is the less likely judges are to detect it.⁷¹ More generally, many scholars have pointed out that judges bring their own unacknowledged biases to bear on a case, which is all the more problematic since judges will often form part of the dominant group and will 'therefore have the luxury of seeing their perspectives mirrored and reinforced in major social and political institutions'.⁷² In order to avoid these pitfalls as much as possible, a rigorous judicial assessment of context is needed. Moreover, such an assessment not only serves to detect and name stereotypes, but also to appraise whether and, if so, to what extent they are harmful. Below is a discussion of some of the various contextual factors that the ECtHR should take into account.

ii. Historical context

⁶⁹ Along with Sophia Moreau, by 'based upon stereotypes' I mean either 'motivated by stereotypes' or 'publicly justified in terms of stereotypes.' Moreau, 'The Wrongs of Equal Treatment', (2004) 54 *University of Toronto Law Journal* 291 at 297. Thus, Moreau alerts the reader to the fact that stereotypes can play a damaging role both on the level of (the inner world of) motivations and (the outer world of) justifications.

⁷⁰ Cook and Cusack, *supra* n 8 at 40.

⁷¹ Young, 'Unequal to the Task: 'Kapp'ing the Substantive Potential of Section 15', (2010) 50 *Supreme Court Law Review* 183 at 207-08.

⁷² Minow, *Making All the Difference: Inclusion, Exclusion and American Law* (Ithaca: Cornell University Press) at 62. See also, e.g., Young, *supra* n 71 at 207; Gerards, *supra* note 62 at 5; and Lawrence, *supra* note 3 at 380.

Whether a stereotype is harmful depends to a large extent on the historical context in which it is used. In *Andrle v Czech Republic* the Court showed itself well aware of this.⁷³ The case concerned the Czech pension scheme which provides for lower pensionable ages for women who have raised children than for men who have raised children. The rule was clearly based on the woman-homemaker/man-breadwinner stereotype. The Court held that it 'cannot overlook the fact that the measure at stake is rooted in specific historical circumstances', namely the expectation that existed in then socialist Czechoslovakia that women worked full-time as well as fulfilling the 'traditional mothering role'.⁷⁴ In light of this historical context, the Court judged that the rule was not harmful, because the aim was 'to compensate for the factual inequality between men and women'.⁷⁵

To place a gender stereotype in its historical context and thus assess its harmfulness, the Court can ask itself various questions. Is there a history of gender discrimination vis-à-vis a particular right?⁷⁶ Or is there a history of discrimination in a specific sort of situation? Has the group concerned (be that women, homosexuals, women with a particular ethnic or religious background, or transsexuals, etc.) been excluded from a particular right in the past? Is there a conceivable analogy between the current regulation and historical rules or practices that were discriminatory?⁷⁷ One way in which these kinds of questions have come up in the judgments of the Strasbourg Court – though not necessarily in the stereotype-context – is in cases where an abundance of international reports and other materials indicate a widespread equality-problem in a certain State. Examples include cases concerning discrimination of Roma in Romania⁷⁸ and domestic violence against women in Turkey.⁷⁹

⁷³ *Andrle v Czech Republic* Application No 6268/08, Merits, 17 February 2011.

⁷⁴ *Ibid.* at para 53-5.

⁷⁵ *Ibid.* at para 60. Whether the Court got it right here is doubtful. What the Court overlooks is that by maintaining this rule that was based on a gender stereotype, the stereotype is reaffirmed and legitimized in the present. In other words, the current effects might be harmful (see the next paragraphs below). Psychological research has evidenced that this sort of 'benevolent sexism' may play an important part in justifying and maintaining gender inequality. See, e.g., Jost and Kay, 'Exposure to benevolent sexism and complementary gender stereotypes: Consequences for specific and diffuse forms of system justification', (2005) 88 *Journal of Personality and Social Psychology* 498.

⁷⁶ The Court emphasizes the importance of historical discrimination in *D.H. and Others v Czech Republic* (2007); 47 EHRR 3; *Alajos Kiss v Hungary* Application No 38832/06, Merits, 20 May 2010; and *Kiyutin v Russia* Application No 2700/10, Merits, 10 March 2011 (though these three cases did not concern discrimination on the basis of sex).

⁷⁷ Cf. Lenhardt, 'Understanding the Mark: Race, Stigma, and Equality in Context', (2004) 78 *New York University Law Review* 803 at 892-93.

⁷⁸ *Carabulea v Romania* Application No 45661/99, Merits, 13 July 2010 (see especially the dissenting opinion by Judges Gyulumyan and Power).

⁷⁹ *Opuz v Turkey* Application No 33401/02, Merits, 9 June 2009.

iii. Current effects

An anti-stereotyping approach also requires an awareness of the effects of a rule or practice – that is, judges need to perform a reality check. What are the effects of the challenged rule or practice on individual men and women? To make sure that it takes an intersectional approach to discrimination, the Court should ask what the effects are on particular groups of men and women, like women from a particular ethnic or religious background, or of a particular age and (dis)ability. The anti-stereotyping approach is not based on rigid-discrimination grounds, and invites research into the more complex reality in which human beings find themselves.

What kind of harm is caused to whom? Note that the Court has to investigate material (distribution) and social status (recognition) effects, as well as psychological effects, where appropriate. To find out the recognition effects the Court may ask what a particular rule implies about the status of a certain group. To get a sense of psychological effects, the Court might use materials submitted by third party interveners and the materials submitted by the applicants themselves. This points to the fact that the Court cannot do the hard work of combating gender stereotypes alone. The Court is dependent on others (the parties and third-party interveners) to gather sufficient information about the case and on that basis to create good law. Through an exploration of the historical context of a rule or practice, and its current effects, the Court must determine whether harmful gender stereotypes play a role in a case.

iv. Unmasking the stereotype

In the final step of this first phase the Court will have to unmask the harmful stereotypes, in the sense that the Court has to make clear what the adverse consequences of these stereotypes are and what the State's international obligations are to combat gender stereotypes.

C) Second phase: contesting

Whenever the Court identifies a harmful gender stereotype, the Court should take a number of steps to combat it.

i. Declaring Article 14 ECHR or Protocol 12 applicable

To trigger the analysis outlined below, a preliminary necessity is to declare Article 14 or Protocol 12 ECHR applicable. My argument is that if a given issue is deeply imbued with harmful stereotypes about certain vulnerable groups, this constitutes a presumption that the prohibition of discrimination (Article 14 or Protocol 12) applies.⁸⁰

The next steps are all developed with the model of judicial review as developed by Janneke Gerards in mind.⁸¹

ii. Applying the very weighty reasons test:

The general rule should be that when a regulation or practice is based on harmful gender stereotypes, the Court will automatically do an intensive review. This means that the very weighty reasons test ought to be applied and, consequently, the State should be left a very small, if any, margin of appreciation.⁸²

The rule that is proposed here ought not to make a lot of difference with the present case law, since the Court has to apply the very weighty reasons test anyway when the State makes a distinction on the basis of sex or sexual orientation.⁸³ However, the practice of the Court has been less clear cut.⁸⁴ The Court has on several occasions watered down the very weighty reasons test by granting a margin of appreciation to the State in cases of gender discrimination. In *Andrle v Czech Republic*, for example, the

⁸⁰ Incidentally, it is preferable to apply this Article explicitly. In *Alajos Kiss* the Court used a discrimination analysis in an Article 3 Protocol 1 case without explicitly involving Article 14; the result is somewhat confusing. *Alajos Kiss v Hungary* Application No 38832/06, Merits, 20 May 2010, at para 42-4. The case concerned a man who suffered from depression and was put under partial guardianship because of this condition. Hungarian law stipulated that he was automatically stripped from his voting rights. The Court ruled that is a violation of Article 3 Protocol 1.

⁸¹ See *supra* Part 4A.

⁸² The margin of appreciation in the sense that I refer to it here, is the margin that is left to the domestic authorities to determine whether their laws and policies are in accordance with the Convention. The Court tends to award a wide margin of appreciation in cases that concern socially/culturally sensitive subjects about which no consensus exists among the Member States. See generally, e.g., Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (Dordrecht: Martinus Nijhoff, 1996). See specifically about the link between the margin of appreciation and consensus (from a critical perspective): Benvenisti, 'Margin of Appreciation, Consensus and Universal Standards', (1998-1999) 31 *New York Journal of International Law and Politics* 843.

⁸³ In addition, it may be argued that since all the contracting States to the Convention are also parties to CEDAW, a consensus exists that harmful gender stereotypes should be eliminated. The Court uses the consensus-argument regularly to apply the very weighty reasons-test: *Christine Goodwin* is well known in this context. *Christine Goodwin v United Kingdom* 2002-VI; 35 EHRR 18.

⁸⁴ There is a wide array of scholarship documenting the lack of a coherent standard for the application of the margin of appreciation. See, e.g., Letsas, 'Two Concepts of the Margin of Appreciation', (2006) 26 *Oxford Journal of Legal Studies* 705.

Court pays lip service to the idea of the very weighty reasons test,⁸⁵ but then goes on to grant the State a decisively wide margin of appreciation because the case concerns an issue of social and economic strategy.⁸⁶

From an anti-stereotyping perspective, it is imperative that the Court consistently applies the very weighty reasons-test in all cases. When a case is based on harmful gender stereotypes, not only the discrimination ground (sex) is suspect, but also the form (stereotypes) is suspect. This should lead the Court to be extremely critical in the third step of the contesting phase; the assessment of justifications (see below).

iii. Drop the comparator and instead apply the disadvantage-test

The comparability-test should, as Gerards suggests, be exchanged for the more appropriate focus on disadvantage. The comparability-test is not well suited to cases that revolve around stereotypes,⁸⁷ because the way that gender stereotypes affect the autonomy of certain women and men is a harm that stands on its own: the disadvantage is not dependent on a comparison with another group of people. Sophia Moreau writes: ‘the reason this treatment amounts to a wrong . . . depends only on the fact that, considered in and of themselves, these individuals have been treated in an unacceptable way by the government: they have been denied a benefit in a manner that lessens their autonomy’.⁸⁸ Let me elucidate this point with an example from the case law of the ECtHR. In *Aksu v Turkey* one of the complaints concerned a Turkish State-sponsored dictionary that defined ‘gypsy’ as, among other things, ‘stingy’.⁸⁹ This constitutes a recognition-harm towards Roma. The harm lies in the fact that the dictionary includes derogatory stereotypes, and one cannot define the harm with an appeal to a comparator as there is no suitable comparator present. The same applies to cases of intersectional discrimination.⁹⁰ While in some cases there might be an appropriate comparator available, this makes that – on the whole – the comparability-test is not appropriate for stereotype-cases.

⁸⁵ *Andrle v Czech Republic* Application No 6268/08, Merits, 17 February 2011, at para 49.

⁸⁶ *Ibid.* at para 56 and 60.

⁸⁷ This point has been made both in relation to American and Canadian case law, which is significant since in both these jurisdictions courts have a wide experience adjudicating cases that concern discrimination on the basis of stereotypes. See, e.g., Goldberg, ‘Discrimination By Comparison’, (2011) 120 *Yale Law Journal* 728 at 779-91 (United States); and Moreau, ‘Equality Rights and the Relevance of Comparator Groups’, (2006) 5 *Journal of Law and Equality* 81 (Canada).

⁸⁸ Moreau, *supra* n 69 at 303.

⁸⁹ *Aksu v Turkey* Application No 4149/04 and 41029/04, Merits, 27 July 2010.

⁹⁰ Cf. Goldberg, *supra* n 87 at 757.

The disadvantage-test is not difficult to pass in stereotype-cases. If during the first phase of an anti-stereotyping analysis, as outlined above, it turns out that a gender stereotype is harmful to the applicant and the group that she belongs to and that a rule or State practice is based on such a harmful stereotype, then that in itself is proof of disadvantage. When a case is based on harmful gender stereotypes, the Court can almost automatically decide that there is a disadvantage.

iv. Harmful gender stereotypes cannot constitute a justification

I have just argued that when a case is based on harmful gender stereotypes the Court should always apply the very weighty reasons test and decide automatically that there is a disadvantage. This means that the first and second steps of the decision model in this anti-stereotyping analysis are nearly taken mechanically; therefore, the core of the judicial assessment of the anti-discrimination provision will concern the issue of justifications.⁹¹

The goal of a stereotype-analysis is exposing and contesting the patterns that lead to structural discrimination. Such an analysis aims to render explicit and problematic what society experiences as 'natural'. This article argues that the Strasbourg Court should adopt a critical attitude towards the reasons and justifications States put forward for their actions. This is what Kenji Yoshino terms a 'reason-forcing conversation'.⁹² States ought to base their regulations and actions on rationally defensible grounds, not on gender stereotypes and prejudices.⁹³ This also means that the Court should keep asking questions; vague arguments, such as we need to preserve our 'culture'⁹⁴ or 'tradition',⁹⁵ are not sufficient as justifications. From an anti-stereotyping perspective, such arguments are even suspect:

⁹¹ This is not as revolutionary as it might sound: firstly, it is well established that distinctions on the basis of sex require an intensive scrutiny from the Strasbourg Court and, secondly, diverse scholars have argued that the Court usually focuses on issues of justification, rather than on the question of whether there is a comparator present. See, e.g., O'Connell, *supra* n 19 at 217-19; and Van Dijk et al. (eds), *Theory and Practice of the European Convention on Human Rights*, 4th edn (Antwerp: Intersentia, 2006) at 1041.

⁹² Yoshino, *supra* n 51 at 178.

⁹³ This position is in some sense similar to Ronald Dworkin's point that certain reasons cannot provide adequate justifications for a curtailment of people's rights. Impermissible considerations are the ones that are based on 'external preferences'; Jeremy Waldron defines these as the 'views that people may have about the value of others or the worthiness of others' desires'. Dworkin, *Taking Rights Seriously* (Cambridge, Massachusetts: Harvard University Press, 1977) at 234-39; Waldron, 'Pildes on Dworkin's Theory of Rights', (2000) 29 *Journal of Legal Studies* 301 at 302.

⁹⁴ *Parry v United Kingdom* Application No 42971/05, Admissibility, 28 November 2006.

⁹⁵ *Karner v Austria* 2003-IX; 38 EHRR 528, at para 40.

appeals to tradition and culture are often appeals to the popularity of stereotypes.⁹⁶ Gender stereotypes are articulated and validated in cultural practices and images.⁹⁷ The CEDAW Committee has acknowledged the link between culture and gender stereotypes explicitly in Article 5(a) CEDAW and commented in General Recommendation 23, on women in political and public life: 'In all nations, cultural traditions and religious beliefs have played a part in confining women to the private spheres of activity and excluding them from active participation in public life.'⁹⁸

For these reasons, an appeal to a stereotype cannot form a justification. Strong support for this assertion can be found in the existing case law. In the recent case of *Konstantin Markin v Russia* the Court states: 'To the extent that the difference was founded on the traditional gender roles, that is on the perception of women as primary child-carers and men as primary breadwinners, these gender prejudices cannot, by themselves, be considered by the Court to amount to sufficient justification for the difference in treatment, any more than similar prejudices based on race, origin, colour or sexual orientation.'⁹⁹ If you substitute the word 'prejudices' here for the more accurate 'stereotypes', this is exactly the approach this article is pleading for. Older cases should not be overlooked either: the Court has already determined that 'negative attitudes' towards a particular group cannot form a justification,¹⁰⁰ nor can arguments that only reflect 'the traditional outlook',¹⁰¹ nor can an appeal to 'cultural reasons'.¹⁰²

V. By way of illustration: Konstantin Markin v Russia, Rantsev v Cyprus and Russia, and beyond

⁹⁶ Cf. Dworkin, 'Rights as Trumps', in Waldron (ed) *Theories of Rights* (New York: Oxford University Press, 1985) 153 at 162.

⁹⁷ Holtmaat and Naber, *supra* n 22 at 57. See also Raday, 'Culture, religion, and gender', (2003) 1 *International Journal of Constitutional Law* 663. Raday writes: 'The most globally pervasive of the harmful cultural practices . . . is the stereotyping of women exclusively as mothers and housewives in a way that limits their opportunity to participate in public life, whether political or economic.' *Ibid.* at 671.

⁹⁸ CEDAW Committee, General Recommendation 23: political and public life (Article 7), 13 January 1997, A/52/38/Rev.1; 5 IHRR 7 (1998), at para 10.

⁹⁹ *Konstantin Markin v Russia* Application No 30078/06, Merits, 7 October 2010, at para 58. The next Part will contain more discussion of the *Konstantin Markin* case.

¹⁰⁰ *L. and V. v Austria* 2003-I; 36 EHRR 1022, at para 52.

¹⁰¹ *Inze v Austria* A 126 (1987); 10 EHRR 394, at para 44.

¹⁰² *Zarb Adami v Malta* 2006-VIII; 44 EHRR 3, at para 81-2.

To illustrate the approach that I am arguing for, this part will think through two major recent gender discrimination cases from an anti-stereotyping perspective: *Konstantin Markin* and *Rantsev*. One difference between these cases is that the Court recognized *Konstantin Markin* as a gender discrimination case, but did not recognize *Rantsev* as such. What these cases have in common is that both are on the face of it ‘successful’ gender equality cases, in the sense that the Court ruled in favour of the victim of discrimination, but that both leave something to be desired in the application of a gender analysis.¹⁰³ It is rewarding to discuss them together as these cases complement each other; *Konstantin Markin* concerns a question of formal discrimination and *Rantsev* concerns questions of positive obligations. Most important, though, is that both of these cases offer very promising transformative potential, but both fall short of realizing this potential to the fullest. Focusing on the problem of stereotypes shows why. After these two case studies, to conclude, this part puts forward a few suggestions concerning other areas of gender case law that would benefit in particular from the approach this article advocates.

A) *Konstantin Markin v Russia*

This case concerns Konstantin Markin who is a military serviceman and father of three children.¹⁰⁴ He and his wife divorced and decided that he would be the caretaker of their children, who were very young at the time, and that she would pay child support. Markin subsequently asked the relevant authority for three years parental leave allowance but his request was denied because according to the law leave of such duration could only be granted to military servicewomen. The Russian courts rejected Markin’s complaint that this constituted discrimination. What makes this case particularly interesting in the context of an anti-stereotyping approach is the Russian Constitutional Court’s justification for the rule that excludes military servicemen from parental leave. The Constitutional Court observed in its judgment: ‘By granting, on an exceptional basis, the right to parental leave to servicewomen only, the legislature took into account, firstly, the limited participation of women in military service and, secondly,

¹⁰³ Cf. Bonthuys, supra n 22 at 4.

¹⁰⁴ Some might doubt whether this case, which concerns a male applicant, is an appropriate illustration of the anti-stereotyping approach. I would point out that gender stereotypes that harm women can efficaciously be dismantled through focusing on cases with male applicants. Ruth Bader Ginsburg pioneered this line of attack in the equal protection cases that she brought to the US Supreme Court in the 1970s. See for an incisive account of Ginsburg’s work and the rich equality theory underlying it, Franklin, supra n 11.

the special social role of women associated with motherhood.’¹⁰⁵ Relying on Article 14 taken in conjunction with Article 8 (the right to private and family life), Markin subsequently complained to the ECtHR that the refusal to grant him parental leave amounted to discrimination on account of sex. The First Section of the Court handed down its judgment in October 2010. However, Russia successfully appealed to the Grand Chamber and we are currently awaiting its decision.

From a gender perspective, some of the Chamber’s judgment is worth applauding. First of all, the outcome is good: the Court finds a violation of the Convention. Also, the Court acknowledges that in most countries in Europe, both mothers and fathers can take parental leave, and the Court emphasizes that ‘men’s caring role has gained recognition’.¹⁰⁶ Most significant from the point of view of this article is the fact that the Court dismantles an important stereotype on which the ruling against Markin by the Russian Constitutional Court was based, namely the woman-homemaker/man-breadwinner idea. The relevant paragraph is already quoted in Part IV, but it bears repeating that the Court held that ‘the perception of women as primary child-carers and men as primary breadwinners’ cannot ‘amount to sufficient justification for the difference in treatment, any more than similar prejudices based on race, origin, colour or sexual orientation’.¹⁰⁷

However, an anti-stereotyping approach reveals that the judgment also has serious shortcomings. Naturally we will have to await the judgment by the Grand Chamber, but what the Court achieves with this judgment – assuming Russia will comply with its obligations under the Convention¹⁰⁸ – is *greater inclusion of men, but no amelioration of the situation of women in the Russian army*. The Court overlooks the fact that not only (service)men are affected and burdened with stereotypes in this case, and that the woman-homemaker/man-breadwinner idea is not the only stereotype at issue here. The Russian Court based its finding on several interrelated stereotypes concerning military servicewomen, like military servicewomen do not play a crucial part in the army, and military servicewomen are less important than military serviceman. The Strasbourg Court should have named these stereotypes as well.

The Court fails to name and dislodge these other gender stereotypes, because it does not make an adequate context-assessment in *Konstantin Markin*. In order to name these stereotypes, the Court

¹⁰⁵ *Konstantin Markin v Russia* Application No 30078/06, Merits, 7 October 2010, at para 19.

¹⁰⁶ *Ibid.* at para 49.

¹⁰⁷ *Ibid.* at para 58.

¹⁰⁸ *Konstantin Markin* and other cases in which the Court was critical of Russian legislation have generated such a storm of critique is Russia, that the President of the Russian Constitutional Court even talked of withdrawing from the ECHR. Ferris-Rotman, ‘Russia Could Shun European Rights Court – Top Judge’, 22 November 2010, available at: <http://www.reuters.com/article/2010/11/22/us-russia-court-rights-idUSTRE6AL5IW2010112> [last accessed 22 August 2011].

could have engaged in the kind of context assessment that is set out above, in Part IV.B. Obviously, this case is set within the context of gender norms and practices in the Russian military. While it is difficult to obtain comprehensive information regarding the position of women in the Russian army, the picture that emerges from the sources that are available is one of a thoroughly male-dominated institution in which female soldiers are kept in the 'carefully-labeled compartments' that are deemed fit for women by the Defense Ministry.¹⁰⁹ Since the early 1990's, when contract service was introduced in Russia as a supplement to the system of conscription that was becoming increasingly unpopular among young men, the number of women in the Russian military has risen to more than 110,000.¹¹⁰ Women now constitute approximately 10 percent of the armed forces in Russia.¹¹¹ However, even while their number has grown, the situation of servicewomen has not very noticeably ameliorated.¹¹² Military servicewomen are grossly underrepresented in leadership positions,¹¹³ they report extensive violations of their socio-economic rights,¹¹⁴ and they are frequently victim of sexual harassment.¹¹⁵ Women's limited prospects of promotion are partly the result of their supervisors' conviction that women's place, especially women with children, is in the family and that their 'family concerns would prevent them from carrying out their professional duties.'¹¹⁶ Political scientist Jennifer Mathers has observed that the 'sharp distinction between men's and women's work and the apparent ban on women performing a wide range of military duties has caused one officer to comment that there is a limit to the proportion of servicewomen which the Russian armed forces is able to employ'.¹¹⁷

¹⁰⁹ Mathers, 'Women in the Russian Armed Forces: A Marriage of Convenience?', (Fall-Winter 2000) 18 *Minerva: Quarterly Report on Women and the Military* 129 at 139.

¹¹⁰ Ibid.

¹¹¹ Mathers, 'Russia's Women Soldiers in the Twenty-First Century', (Spring 2007) 1 *Minerva Journal of Women and War* 8 at 11.

¹¹² Smirnov, 'Women in the Russian Army', (2002) 43 *Russian Social Science Review* 61 at 62.

¹¹³ Ibid. at 62 and 67; see also Mathers, supra n 109 at 131.

¹¹⁴ Smirnov, supra n 112 at 67.

¹¹⁵ Christine Eifler, 'Das unterschätzte Potenzial: Soldatinnen in den russischen Streitkräften [The Underestimate Potential: Female Soldiers in the Russian Military]', (2006) *The Journal of Power Institutions in Post-Soviet Societies*, available at: <http://pipss.revues.org/index498.html> [last accessed 22 August 2011]; Mathers, supra n 109 at 136.

¹¹⁶ Mathers, 'Women, Society and the Military: Women Soldiers in Post-Soviet Russia', in Webber and Mathers (eds), *Military and society in post-Soviet Russia* (Manchester and New York: Manchester University Press, 2006) 207 at 211. Based on empirical research with a sample of 993 military servicewomen, Smirnov states: 'In the military, women's promotion strongly depends on their family situation. Single mothers, married women, divorcees, and widows with children have fewer chances to occupy a high position, because their superior officers are firmly convinced that family concerns would prevent them from carrying out their official duties.' Smirnov, supra n 112 at 67.

¹¹⁷ Mathers, supra n 109 at 138.

All of this demonstrates that the argument used by the Russian Constitutional Court, namely that the rules regarding parental leave are justified because of women's special role as mothers and their limited participation in the military, is unsound. This context assessment exposes the harm of that argument: gender stereotypes are precisely what limit women's participation in the military. As the Strasbourg Court acknowledges, the rules that are based on these gender stereotypes have the effect of putting military men who are also fathers with primary caretaking responsibilities in the intolerable position of having to choose between their profession and their family life, while servicewomen face 'no such choice'.¹¹⁸ Unfortunately, the Court neglects the other side of the coin, namely that, at the same time, these stereotypes restrict women's access to professional careers in the military, diminish the quality of these careers, and put the burden of domestic work on women.¹¹⁹

So how would this case have turned out differently using an anti-stereotyping approach? The focus on stereotypes necessarily brings with it a contextual analysis and, with that, an awareness of the larger societal issues that are at stake. Because the Court neglects the context of this case – it does not make the link between the position of Konstantin Markin and the structural problems that women in the Russian army face – the Court fails to dislodge the underlying structures that are male-defined and excluding of women. In other words, the lack of a contextual analysis limits the transformative potential of this case.

In a rather unusual move, which suggests that the Court does aim for transformation, the Court suggests Russia adopt general measures to amend the Military Service Act.¹²⁰ If the majority had placed Mr Markin's complaint in the context of the systemic gender problems in the military, they might have pre-empted the criticism by dissenting Judge Kovler that 'this isolated case does not impose on the respondent State a legal obligation to implement appropriate general measures'.¹²¹ The Court should have shown that the predicament in which Mr. Markin found himself was no 'isolated case', but, on the contrary, symptomatic of the structural problems that both men and women face in the army due to deeply embedded gender stereotypes. That way, the Court could have made a stronger case in favour of the much needed general measures that should not only entail legislative change to ameliorate the

¹¹⁸ *Konstantin Markin v Russia* Application No 30078/06, Merits, 7 October 2010, at para 58.

¹¹⁹ Mathers, *supra* n 116 at 215.

¹²⁰ *Konstantin Markin v Russia* Application No 30078/06, Merits, 7 October 2010, at para 67.

¹²¹ *Ibid.* (Kovler J., dissenting).

position of male military personnel, but more comprehensive measures aimed at improving the situation of women in the military.

B) Rantsev v Cyprus and Russia

The *Rantsev* case concerns a 20-year old Russian woman, Oxana Rantseva, who was the victim of sex trafficking and who eventually died under suspicious circumstances.¹²² Rantseva was admitted to Cyprus on a so-called 'artiste visa'. The visa was procured for her by an owner of a 'cabaret', and allowed Rantseva to work in that cabaret. It is general knowledge in Cyprus that these artiste visas are in practice a gateway into prostitution, even to the degree that the word 'artiste' has become synonymous with the word 'prostitute'.¹²³ The sequence of events is as follows: after working for a few days at the cabaret, Rantseva left her apartment, leaving a note saying that she was going back to Russia. A few days later she was found by somebody who contacted the brother of the owner of Rantseva's cabaret. That brother brought her to the police, alleging that Rantseva was illegally in Cyprus and that the police should hold her in the cell. He then left. The person in charge at the police station gave the order that the owner of the cabaret should be contacted and ordered to 'collect' Rantseva.¹²⁴ The brother of the owner came back to the station, picked up Rantseva and brought her to the apartment of one of his employees. They put Rantseva in a room on the sixth floor and allegedly left her alone. Sometime later she was found lying dead on the street below the apartment. The Cypriot authorities started an investigation into her death which, as the Strasbourg Court later concluded, was conducted in an unsatisfactory manner.

In many ways, *Rantsev* is a more complicated case than *Konstantin Markin*. The case concerns various private perpetrators, numerous authorities and several Articles of the Convention. The Court handed down a very thorough judgment on human trafficking in general, holding that trafficking as such falls under Article 4 (the prohibition of slavery, servitude and forced labour) of the Convention and that Cyprus and Russia violated this provision. The Court considers that:

Trafficking in human beings, by its very nature and aim of exploitation, is based on the exercise of powers attaching to the right of ownership. It treats human beings as commodities to be bought

¹²² *Rantsev v Cyprus and Russia* Application No 25965/04, Merits, 7 January 2010.

¹²³ *Ibid.* at para 83.

¹²⁴ *Ibid.* at para 20.

and sold and put to forced labour, often for little or no payment, usually in the sex industry but also elsewhere . . . There can be no doubt that trafficking threatens the human dignity and fundamental freedoms of its victims and cannot be considered compatible with a democratic society and the values expounded in the Convention.¹²⁵

In addition, the Court followed international human rights treaties to determine the obligations that rest on State Parties' to prevent and punish trafficking. The Court referred extensively to the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children¹²⁶ and the Anti-Trafficking Convention of the Council of Europe.¹²⁷ The present analysis will focus on those aspects of the case that are linked to gender stereotypes and will not encompass all facets of the case.

As for the first part of the anti-stereotyping approach, the naming stage, the crux of the problem in *Rantsev* is different from the one in *Konstantin Markin*. In *Konstantin Markin* the problem lies in the lack of contextual framing; in *Rantsev*, on the other hand, the Court does an impressive job of collecting background data and assessing the wider context of this case, namely the highly problematic 'artiste visa'-regime in place at that time in Cyprus, the appalling conditions in which the foreign women workers live and the exploitation that the women are subjected to. The Court uses an extensive amount of materials to establish that 'artistes' are often trafficked, exploited and abused and that the Cypriot government is well aware of these facts.

Despite this impressive context assessment, the shortcomings of the *Rantsev*-judgment are in a sense more far-reaching than the ones of *Konstantin Markin*. Whereas in the latter case the Court fails to name many of the gender stereotypes at issue; in *Rantsev* the Court ignores the gender-dimension to the case completely.¹²⁸ Having collected all the evidence, the Court could have made a relatively easy case for indirect discrimination as the grand majority of the victims of the exploitative 'artiste visa'-regime are women.¹²⁹ It is actually puzzling why the Court has not applied Article 14 in conjunction with

¹²⁵ Ibid.at para 281-82.

¹²⁶ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime 2000, 2237 UNTS 319.

¹²⁷ Council of Europe Convention on Action Against Trafficking in Human Beings 2005, CETS 197.

¹²⁸ As third party intervener, Interights did point out in its written submission that 'human trafficking for sexual exploitation is a form of violence against women'. Therefore, the argument that this case concerns an issue of gender had been made to the Court. Interights, 'Written Submission *Rantsev v Cyprus and Russia*, Application 25965/04', at para 15-19, available at: <http://www.interights.org/rantsev/index.html> [last accessed 22 August 2011].

¹²⁹ Cf. *Opuz v Turkey* Application No 33401/02, Merits, 9 June 2009, at para 192-200.

Article 4, as it has determined in previous cases that ‘a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory notwithstanding that it is not specifically aimed at that group . . . and that discrimination potentially contrary to the Convention may result from a *de facto* situation’.¹³⁰

The Court names ‘exploitation’ as the central harm of trafficking, but does not explore how this exploitation is gendered.¹³¹ In other words, it neglects to ask what has been termed ‘the woman question’.¹³² What does the Cypriot legislation and the actions of the Cypriot authorities imply about the status of women with an artiste visa? The Court overlooks the gender stereotypes that play a role in this case, possibly because the Cypriot and Russian authorities do not directly invoke stereotypes – as was the case in *Konstantin Markin*.

In *Rantsev*, exposing the operative gender stereotypes requires probing the artiste visa-regime. The rule that stipulates that the artiste visa is to be procured by the ‘artistic agents’ corresponds with the conduct by the Cypriot police in demanding that the owner of the cabaret collect Rantseva at the police station: both imply that the agents in this system are the (male) cabaret owners and not the women themselves – with the effect that women are made dependant on their exploiters.¹³³ Women with an artiste visa are seen as the (sexual) property of their employers. One report on trafficking in Cyprus refers to the ‘patriarchal social attitudes according to which a man’s desire for sex is considered a primal need that needs to be satisfied, and it is a woman’s responsibility to provide this satisfaction.’¹³⁴ The behaviour of the Cypriot police (in not letting Rantseva leave by herself even though she had done nothing illegal) is also in accordance with what one researcher of Cypriot stereotypes writes: ‘Russian and Rumanian women are seen as a source of disorder and danger’.¹³⁵ In Cyprus, women are often

¹³⁰ *D.H. and Others v Czech Republic* (2007); 47 EHRR 3, at para 175; *Opuz v Turkey* Application No 33401/02, Merits, 9 June 2009, at para 183. See also *supra* Part 2.

¹³¹ There is a lot of literature on the topic of gender and trafficking. See, e.g., Sullivan, ‘Trafficking in Women: Feminism and New International Law’, (2003) 5 *International Feminist Journal of Politics* 67.

¹³² ‘In law, asking the woman question means examining how the law fails to take into account the experiences and values that seem more typical of women than of men, for whatever reason, or how existing legal standards and concepts might disadvantage women. . . Asking the woman question reveals the ways in which political choice and institutional arrangement contribute to women’s subordination.’ Bartlett, ‘Feminist Legal Methods’, (1990) 103 *Harvard Law Review* 829 at 837 and 843.

¹³³ See also the materials quoted in *Rantsev v Cyprus and Russia* Application No 25965/04, Merits, 7 January 2010, at para 100.

¹³⁴ Mediterranean Institute of Gender Studies, ‘Mapping the Realities of Trafficking in Women For the Purpose of Sexual Exploitation in Cyprus’, October 2007, available at: http://www.medinstgenderstudies.org/wp-content/uploads/migs-trafficking-report_final_711.pdf [last accessed 22 August 2011].

¹³⁵ Vassiliadou, ‘Women’s Constructions of Women: On Entering the Front Door’, (May 2004) 5 *Journal of International Women’s Studies* 53 at 60. Myria Vassiliadou also relates the following story, which is telling of

stereotyped as either mothers¹³⁶ or sex symbols.¹³⁷ These gender stereotypes exist at the highest level of Cypriot society and authority: the former Minister of Justice of Cyprus purportedly said in 2003 that '[t]he dream of 45% of women is to become prostitutes.'¹³⁸ Thus, quite apart from the considerable economic interest that Cyprus has in the sex industry, it becomes apparent why sex trafficking is not seen as a 'real' problem. This is deeply troubling, as the effects of these gender stereotypes are as damaging as they are wide-ranging.¹³⁹ Oxana Rantseva did not survive her stay in Cyprus as an 'artiste'.

Which raises the question: what difference would adopting the anti-stereotyping approach make? If the Court manages to uncover the reasons that make women, more than men, vulnerable to sex trafficking, it can be more specific regarding the positive obligations that lay on the States to prevent trafficking, punish the perpetrators and protect the victims.¹⁴⁰ In other words, these positive obligations can be more narrowly tailored to address the specific needs of the female victims. If the Court neglects the underlying gender stereotypes that affect the supply and demand side of sex trafficking, it is treating the symptoms but not the disease.

To conclude, *Rantsev* sheds light on a number of important issues with regards to the anti-stereotyping approach. First, one might say that this case reminds us of the limits to this approach. *Rantsev* illustrates that gender stereotypes are pernicious not least because they blind us to human rights abuses, but at the same time the facts of the case demonstrate that gender stereotyping is not the supreme and only problem affecting women's position in society. Economic exploitation, for

gender stereotypes in Cyprus: 'when I escorted a Russian student to the Immigration Authorities after she had been forced to have sex with her Cypriot guardian, the immigration officer asked me (as I was translating) if the woman had been a virgin before the 'alleged rape.' I asked whether that made any difference to her case and he replied, 'most of these common women are asking for it, you see. They are poor and they come here to lure our men. We must make sure they are decent, but they never are.'" Ibid. at 61.

¹³⁶ CEDAW Committee, Concluding comments regarding Cyprus, 30 May 2006, CEDAW/C/CYP/CO/5 at para 17.

¹³⁷ Mediterranean Institute of Gender Studies, supra n 134 at 22.

¹³⁸ Ibid. at 7.

¹³⁹ Cyprus itself has recognized the harmful effects of these stereotypes in its country report to the CEDAW Committee. In the words of the Committee: 'The State party's report recognizes these stereotypes as the major obstacle for the advancement of women in Cyprus and as a root cause of women's disadvantaged position in a number of areas, including the labour market, political and public life, the highest levels of the education system and the media, as well as persistent violence against women, especially within the family.' CEDAW Committee, supra n 136 at 17.

¹⁴⁰ The Mediterranean Institute of Gender Studies ('MIGS') describes these reasons as follows: 'Several factors make women more vulnerable than men to being trafficked. MIGS considers the persistent gender discrimination and dominant forms of patriarchy in both countries of origin and destination to be the most important ones. Relating to this, other factors include the feminization of poverty . . . , gender inequality and lack of access to the labour market, lack of education and professional opportunities in the country of origin . . . , and demand for sexual services in the destination countries.' Mediterranean Institute of Gender Studies, supra n 134 at 6.

example, is closely linked to gender stereotypes but should not be conflated with the problem of stereotyping. Society has a powerful interest in exploiting women, as witnessed by the decade's long resistance to the plans to change the Cypriot artiste regime. The anti-stereotyping approach is an attempt at transforming the *status quo*, but is no cure-all. It bears that repeating that we need a holistic approach to gender equality. Second, *Rantsev* makes clear that in cases which do not concern direct discrimination, gender stereotypes are often implicit. Gender stereotypes played a role in *Rantsev* not so much at the level of justifications but at the level of motives, and while justifications are explicit by definition, motives often remain hidden from view. Therefore, uncovering gender stereotypes requires an active stand by the Court. This is a lot to ask, especially considering the Court's workload, but in cases such as this, where a large group of women is systematically exploited, the Court should do no less.

C) The advantages of an anti-stereotyping approach in other gender cases

Above I have described the application of an anti-stereotyping approach vis-à-vis two case studies. In what other types of gender cases could my anti-stereotyping approach provide purchase? Although I do not have the requisite space here for a detailed analysis of more case law, I wish to describe two types of cases that would benefit in particular from the approach suggested by this article. The first strand of cases involves women from sexual, cultural and religious minority backgrounds. In recent years, the Court has been called upon to judge on a wide array of issues that fall under the umbrella of gender and diversity: whether a single lesbian mother should be allowed to adopt a child (*E.B. v France*),¹⁴¹ whether Muslim women should be able to wear a headscarf in state educational institutions if they so chose (*Dahlab v Switzerland* and *Leyla Şahin v Turkey*),¹⁴² and whether forced sterilization of Roma women constitutes discrimination (*V.C. v Slovakia* and *I.G., M.K. and R.H. v Slovakia*),¹⁴³ are but a few examples. These are complex cases in which the judges of the Court face the challenge to move beyond their own prejudices about 'the other' as well as beyond the traditional principles of discrimination law. Many commentators are of the opinion that the Court has failed herein.¹⁴⁴ If the Court were to view these

¹⁴¹ *E.B. v France* 2008; 47 EHRR 21.

¹⁴² *Dahlab v Switzerland* 2001-V; and *Leyla Şahin v Turkey* 2005-XI; 41 EHRR 8.

¹⁴³ *V.C. v Slovakia* Application no 18968/07, Admissibility, 16 June 2009; *I.G., M.K. and R.H. v Slovakia* Application No 15966/04, Admissibility, 22 September 2009.

¹⁴⁴ There is a vast amount of critical literature on the Court's treatment of diversity issues. See, e.g., Brems (ed), *Diversity and European Human Rights: Rewriting Judgments of the European Court of Human Rights* (Cambridge: Cambridge University Press, forthcoming 2012).

cases through an anti-stereotyping lens, what would surface during the first phase of the analysis – ‘naming’ stereotypes – is the intersectionality of these discrimination cases: they all concern discrimination on the ground of gender in combination with some other identity trait (sexual orientation, religion or ethnicity). At issue in the examples that I just mentioned are what Cook and Cusack term ‘compounded stereotypes’, which means ‘gender stereotypes that interact with other stereotypes, which ascribe attributes, characteristics or roles to different subgroups of women.’¹⁴⁵ Thus in *E.B.* the stereotype that lesbian women cannot be good mothers plays a role;¹⁴⁶ in *Dahlab* and *Leyla Şahin* the stereotype that Muslim women who wear headscarves are victims of oppression;¹⁴⁷ and in *V.C.* and *I.G., M.K. and R.H.* the stereotype that Roma women are not good mothers.¹⁴⁸ Recognition of the harm that these compounded stereotypes cause, would lead to a different kind of judicial discourse that goes to the core of the problem of structural gender inequality.

Another area of jurisprudence that could benefit from my anti-stereotyping approach is formed of cases that revolve around State regulations which are effectively stereotypes translated into law. Emblematic are the many cases wherein the Court is confronted with allegations of sex discrimination with respect to the distribution of social benefits. Apart from *Konstantin Markin*, examples from the Strasbourg Court’s docket include *Petrovic v Austria*,¹⁴⁹ *Wessels-Bergervoet v Netherlands*,¹⁵⁰ *Willis v United Kingdom*,¹⁵¹ *Stec v United Kingdom*,¹⁵² *Runkee and White v United Kingdom*,¹⁵³ and *Andrle v*

¹⁴⁵ Cook and Cusack, supra n 8 at 25, see also 29-31.

¹⁴⁶ Ibid. at 31. This stereotype is implicitly relied on by the French authorities when they consider that the applicant’s ‘lifestyle’ (meaning her homosexuality) disqualified her from adopting. *E.B. v France* 2008; 47 EHRR 21, at para 10 and 24-25. The Grand Chamber ruled that this constituted discrimination on the ground of the applicant’s sexual orientation, without, however, making the compounded stereotype explicit.

¹⁴⁷ In these cases, the stereotype is propagated by the Court itself. See supra text accompanying n 5. See also Evans, supra n 5. Evans notes that, paradoxically, we also see the stereotype of Muslim women as aggressor: ‘the Muslim woman as fundamentalist who forces values onto the unwilling and undefended.’ Ibid at 72.

¹⁴⁸ This stereotype is the implicit basis of the domestic authorities’ actions. It is related to other stereotypes such as ‘the Roma want to have many children only because they receive social benefits’. See Commissioner for Human Rights, Recommendation concerning certain aspects of law and practice relating to sterilization of women in the Slovak Republic, 17 October 2003, CommDH(2003)12, at para 12 (also for more background on the widespread practice of forced sterilizing of Roma women in Slovakia).

¹⁴⁹ *Petrovic v Austria* 1998-II; 33 EHRR 307 (male applicant complained that parental leave allowances were only available to mothers; the Court found no violation of the Convention).

¹⁵⁰ *Wessels-Bergervoet v Netherlands* 2002-IV; 38 EHRR 793 (woman complained of a reduction in her pension because her pension was linked to her husband’s insurance status, while the reverse was not the case; the Court found a violation of Article 14 in conjunction with Article 1 Protocol 1).

¹⁵¹ *Willis v United Kingdom* 2002-IV; 35 EHRR 547 (man complained of the non-availability of a widow’s payment and a widowed mother’s allowance for a man; the Court found a violation of Article 14 in conjunction with Article 1 Protocol 1. With respect to the man’s complaint that he was denied a widow’s pension, the Court did not find a violation of the Convention).

Czech Republic.¹⁵⁴ In these cases the Court typically faces the dilemma of what kind of margin of appreciation it should afford to Contracting States: the subject matter (social benefits) warrants a wide margin, but distinctions on the ground of sex demand strict scrutiny and therefore a narrow margin. Application of the anti-stereotyping approach could bring recourse, as in one way or another all these cases turn on the woman-homemaker/man-breadwinner stereotype. Unfortunately, the Court has consistently failed to take such a perspective into account, resulting in an uneven application of the margin of appreciation; as well as an one-dimensional perspective of the problem (as the Court often only looks at the case from the perspective of the men/husbands, but fails to see the wider implications that these social benefits regulations have for women¹⁵⁵); and, finally, a failure to address the urgency of underlying discriminatory patterns, as equality is solely viewed as sameness (formal equality).¹⁵⁶ In the most recent of this string of cases, for example, the Court observed: ‘changes in the perceptions of the roles of the sexes are by their nature gradual . . . the State cannot be criticized . . . for not having pushed for complete equalisation at a faster pace’.¹⁵⁷ With this kind of reasoning, the Court legitimizes harmful gender stereotypes and shies away from fostering rapid transformation. I would be keen to see what dividend an anti-stereotyping approach brings to this area of the Court’s case law.

VI. Conclusion

The judicial approach to equality should be rethought if we want to tackle the structural causes of gender discrimination and oppression. This article has argued that stereotypes are at the heart of the

¹⁵² *Stec v United Kingdom* 2006-VI; 43 EHRR 1017 (two women and two men challenged the rule that the cut-off date to their reduced earnings allowance (to which they were entitled after suffering work-related injuries) was linked to the pension date which was 60 years for women and 65 years for men; the Grand Chamber found no violation of the Convention).

¹⁵³ *Runkee and White v United Kingdom*, Application No 42949/98, Merits, 10 May 2007 (two men complained of the non-availability of a widow’s pension for men; the Court found no violation of the Convention. The men also complained about not receiving a widow’s payment; the Court, following its ruling in *Willis*, did find a violation of the Convention on this count).

¹⁵⁴ *Andrle v Czech Republic* Application No 6268/08, Merits, 17 February 2011. For a brief discussion of this case, see the text accompanying footnotes 73-75.

¹⁵⁵ Cf. Cousins, ‘Widow’s pension and gender equality: *Runkee and White v United Kingdom*’, (2008)15 *Journal of Social Security Law* 90 at 96.

¹⁵⁶ See, e.g., Cousins, *supra* n 155; and Radacic, ‘Gender Equality jurisprudence of the European Court of Human Rights’, (2008) 19 *The European Journal of International Law* 841.

¹⁵⁷ *Andrle v Czech Republic* Application No 6268/08, Merits, 17 February 2011, at para 58.

structural problem of gender inequality, and that the European Court of Human Rights should view equality as a process of transformation in order to address this structural problem. Accordingly, this article is a first effort at creating an anti-stereotyping approach. This analysis is an attempt at radicalism; radical in the sense that it seeks to address the roots of the problem of gender discrimination.

A likely objection will be that an anti-stereotyping approach is incompatible with the valid desire of the Court not to lose legitimacy by appearing 'activistic'. The Court – so the argument runs – cannot afford to be too far ahead of its time. The Court's political legitimacy depends upon the manner in which the Court copes with the specific circumstances in which it operates, especially with its supranational position.¹⁵⁸ I acknowledge that, since stereotypes sometimes correspond to deeply held moral or religious beliefs – such as for example the stereotype that women should be mothers – an anti-stereotyping approach can run afoul of Member States' wishes in sensitive cases such as the ones that concern abortion or same-sex marriage. In those kinds of cases the Court, mindful of its supranational position, usually prefers to show constraint, rather than oblige Member States down a path they are not ready for.¹⁵⁹

How, then, can the Court uphold an anti-stereotyping approach within a jurisdiction that is characterized by a diversity of legal systems and social traditions, without being seen as compromising its legitimacy? I want to suggest two answers to that question, which are related to each other. To start with, my anti-stereotyping approach can initially be seen as a procedural instrument. This does not entail letting go of the fundamental premise of this approach – namely that stereotypes are both cause and manifestation of the structural inequality that non-dominant groups suffer from, and that, therefore, States have an obligation to combat stereotypes. Rather, it means that my approach focuses primarily on the adjudicative process itself (the reasoning of the Court), and only secondarily on the outcome. At its most basic, my article is a plea that the Court should be continuously critical; the Court

¹⁵⁸ Following Mitchell Lasser, Janneke Gerards calls those specific circumstances 'the problematic' of the Court. The problematic of the Court includes (among other factors) its supranational position, its case-load and the differences between the State Parties within the Council of Europe. Gerards, 'Judicial Deliberations in the European Court of Human Rights', in Huls, Adams and Bomhoff (eds), *The Legitimacy of Highest Courts' Rulings* (The Hague: T.M.C. Asser Institute, 2008) 407 at 409-4018.

¹⁵⁹ Examples include *Schalk and Kopf v Austria* Application No 30141/04, Merits, 24 June 2010, at para 62: 'marriage has deep-rooted social and cultural connotations which may differ largely from one society to another. The Court reiterates that it must not rush to substitute its own judgment in place of that of the national authorities, who are best placed to assess and respond to the needs of society' (concerning same-sex marriage); and *A, B, and C v Ireland* Application No 25579/05, Merits, 16 December 2010, at para 241: 'the Court does not consider that the prohibition in Ireland of abortion for health and well-being reasons, based as it is on the profound moral views of the Irish people as to the nature of life . . . exceeds the margin of appreciation accorded in that respect to the Irish State'.

should be interrogative of the underlying social patterns and beliefs that have spawned the cases lodged before it. This brings me to my second point. I argue that the Court should problematize the 'naturalness' of stereotypes and I also argue for reason-forcing conversations: this means that the Court should require domestic authorities to justify their actions and regulations on some other grounds than easy but harmful stereotypes.¹⁶⁰ The Court's active participation in such reason-forcing conversations will surely add to its legitimacy rather than erode it, as by adopting this approach the Court fosters transparency and accountability.

In conclusion, perhaps the most challenging question of all: is this not expecting too much from law? Can we expect our judges to change the *status quo*? For sure, eradicating the roots of gender discrimination is a project that is larger than law. Adopting an anti-stereotyping approach will not work miracles, but it will bring the judges of the European Court of Human Rights to the core of the problem of persisting gender inequality and discrimination. Through dismantling gender stereotypes, the Court can promote new and more equal lifeworlds.

¹⁶⁰ See supra Part 4.C(iv).

3. Judging Stereotypes:

What the European Court of Human Rights Can Borrow from American and Canadian Equal Protection Law

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Abstract

The concept of stereotype is novel in the case law of the European Court of Human Rights. In contrast, anti-stereotyping has long been a central feature of both American and Canadian equal protection law. It is hard to develop a proper legal response to stereotyping, as not all stereotypes are bad and, moreover, laws are inevitably based on generalizations. At a minimum, courts should name stereotypes well and carefully examine their harm. This comparative analysis shows that, at its best, legal reasoning can expose and target the invidious cycle wherein stereotyping and discrimination perpetuate each other.

This article first charts and critiques the emergent ECtHR case law on stereotypes. It then offers a fresh analysis of the strengths and weaknesses of the U.S. and Canadian Supreme Courts' treatment of stereotypes. It concludes by exploring what the ECtHR can borrow from American and Canadian equal protection analysis.

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I. Introduction

The concept of stereotyping is novel in the case law of the European Court of Human Rights (“ECtHR” or “Strasbourg Court”). The Strasbourg Court has started to refer to stereotypes in several recent judgments concerning, notably, race and gender equality.¹ In contrast, “stereotype” has long been part of the constitutional vocabulary in the U.S. and Canada. Anti-stereotyping is a central tenet of equal protection law in both these countries. Especially in the U.S. “the anti-stereotyping principle” has a distinguished pedigree, dating back to the early 1970s.² It comes as no surprise then that the American and Canadian Supreme Courts have developed much richer legal reasoning about stereotypes than the ECtHR. That is why this article seeks insights from their reasoning for the Strasbourg Court.³

Briefly put, stereotypes are beliefs about the characteristics of groups of people. They are, in other words, “attributions of specific characteristics to a group”.⁴ Misconceptions about stereotypes abound.⁵ Contrary to what is often assumed, stereotypes are neither necessarily statistically inaccurate generalizations⁶ (think of notions like “professional basketball players are tall”), nor are they necessarily negative (witness stereotypes such as “Italians are passionate”). Psychologists have done extensive research into the ways in which stereotypes shape judgment and behavior.⁷ Psychologists have also established that stereotypes fulfill several functions. On the one hand, as “cognitive schemas” these beliefs allow us to process information quickly.⁸ Also, stereotyping allows people to differentiate between in- and out-groups and thus to maintain a positive image of oneself and one’s in-group. To a

¹ *Aksu v. Turkey* (GC), App. Nos. 4149/04; 41029/04, 15 March 2012; *Konstantin Markin v. Russia* (GC), App. No. 30078/06, 56 Eur. H.R. Rep. 8 (2013).

² Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83 (2010). See *infra* Part III.A.

³ The South African Constitutional Court and the Inter-American Court for Human Rights also boast a rich stereotyping jurisprudence. See, e.g., *President of the Republic of South Africa and Another v Hugo* 1997 (6) BCLR 708 (S. Afr.); *Atala Riffo and Daughters v. Chile*, Inter-Am. Ct. H.R. (Feb. 24, 2012). These jurisdictions would make for fascinating future research on the concept of stereotypes.

⁴ John F. Dovidio et al., *Prejudice, Stereotyping and Discrimination: Theoretical and Empirical Overview*, in: THE SAGE HANDBOOK OF PREJUDICE, STEREOTYPING AND DISCRIMINATION 3, 5 (John F. Dovidio et al. eds., 2010).

⁵ For discussion, see, e.g., DAVID J. SCHNEIDER, THE PSYCHOLOGY OF STEREOTYPING 562-568 (2004).

⁶ See, e.g., Lee Jussim et al., *The Unbearable Accuracy of Stereotypes*, in: HANDBOOK OF PREJUDICE, STEREOTYPING AND DISCRIMINATION 199 (Todd D. Nelson ed., 2009).

⁷ Three good introductory volumes are STEREOTYPES AND PREJUDICE: ESSENTIAL READINGS (Charles Stangor ed., 2000); HANDBOOK OF PREJUDICE, STEREOTYPING AND DISCRIMINATION, *supra* note 6; THE SAGE HANDBOOK OF PREJUDICE, STEREOTYPING AND DISCRIMINATION, *supra* note 4.

⁸ See, e.g., Dovidio et al, *supra* note 4, at 7.

certain extent, therefore, stereotypes perform necessary functions in our lives, namely those of simplifier and of self-image booster.⁹ On the other hand, stereotypes also constrain. They put people in a box by providing a normative template of what is expected or accepted behavior. Thus, for instance, women are expected to be pretty and men are expected to be tough. In this way, stereotypes reinforce inequality by justifying existing hierarchies and perpetuating discrimination.¹⁰

In legal scholarship, specifically feminist legal scholarship, the connection between the stereotype concept and equality is contested. There is no agreement to what extent a focus on stereotypes helps judges to conceptualize equality in a more meaningful manner. There are three positions on the topic. First, several commentators have maintained that an anti-stereotyping focus has only delivered formal equality to the American and Canadian courts, meaning equality as sameness.¹¹ Then there are other commentators, notably recently from the U.S., who have argued that the anti-stereotyping principle is grounded in a substantive conception of equality that is not *per se* about sameness, but is rather aimed at rectifying the kind of subordination that arises from the enforcement of traditional roles.¹² Lastly, there is a body of scholarship, mainly from human rights scholars, which connects a focus on stereotypes to a transformative conception of equality.¹³ Transformative equality jurisprudence contests and seeks to transform the root-causes of inequality and discrimination. These last commentators assert that stereotypes lie at the roots of social and cultural patterns that privilege some groups over others, and that equality entails transforming these deeply engrained patterns.

This article takes the third approach. Through a comparative analysis, it seeks to uncover both the pitfalls and the potential of the stereotype concept to advance transformative equality. This article envisages a more pedagogical role for the Strasbourg Court in the field of non-discrimination than the Court has played so far. One of the central claims of this article is that the Strasbourg Court should name

⁹ See generally about the functions of stereotypes SCHNEIDER, *supra* note 5, at 363-371.

¹⁰ See, e.g., Peter Glick & Laurie A. Rudman, *Sexism*, in THE SAGE HANDBOOK OF PREJUDICE, STEREOTYPING AND DISCRIMINATION, *supra* note 4.

¹¹ Catharine MacKinnon, *Reflections on Sex Equality under Law*, 100 YALE L. J. 1281, 1292-1293 (1991); Julie C. Suk, *Are Gender Stereotypes Bad For Women? Rethinking Antidiscrimination Law and Work-Family Conflict*, 110 COLUM. L. REV. 1 (2010); Margot Young, *Unequal to the Task: 'Kapp'ing the Substantive Potential of Section 15*, 50 SUPREME COURT LAW REVIEW 183, 209 (2010).

¹² See, e.g., Franklin, *supra* note 2; Neil S. Siegel & Reva B. Siegel, *Struck By Stereotype: Ruth Bader Ginsburg on Pregnancy Discrimination as Sex Discrimination*, 59 DUKE L. J. 771 (2010).

¹³ See, e.g., REBECCA J. COOK & SIMONE CUSACK, GENDER STEREOTYPING: TRANSNATIONAL LEGAL PERSPECTIVES (2010); Sandra Fredman, *Beyond the Dichotomy of Formal and Substantive Equality: Towards a New Definition of Equal Rights*, in TEMPORARY SPECIAL MEASURES: ACCELERATING DE FACTO EQUALITY OF WOMEN UNDER ARTICLE 4(1) UN CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN 111 (Ineke Boerefijn et al. eds., 2003); RIKKI HOLTMAAT & JONNEKE NABER, WOMEN'S HUMAN RIGHTS AND CULTURE: FROM DEADLOCK TO DIALOGUE (2011); Alexandra Timmer, *Toward an Anti-Stereotyping Approach for the European Court of Human Rights*, 11 HUM. RTS. L. REV. 707 (2011).

and contest the forces that underlie structural inequality. These forces often consist of stereotypes. The ECtHR cannot eradicate harmful stereotypes from society all by itself, obviously.¹⁴ However, the Court is part of a larger conversation about equality and about the emancipation of oppressed groups. It matters how the Court's discusses these issues. The Court's legal reasoning, which is studied by lawmakers, judges and legal scholars around the world, should show what the problems are with stereotyping.

With a few notable exceptions,¹⁵ not many commentators have taken a transnational or comparative legal perspective on stereotyping. The bulk of the literature focuses exclusively on the U.S. That is a pity. Seeing through the eyes of others is particularly valuable in this area of law, because, as former Canadian Justice L'Heureux-Dubé has pointed out, that can "provide a much-needed external perspective on the myths and stereotypes that may continue to permeate the values and laws of our own communities and cultures."¹⁶ This article adds to the existing comparative literature by taking the case law of the ECtHR as its starting point and by making suggestions for judicial borrowing. The Strasbourg Court frequently seeks inspiration and guidance from other jurisdictions (both outside and within the Council of Europe).¹⁷ Hopefully the Court is also open to such borrowing when it comes to the concept of stereotype.

This article starts by critically assessing the ways in which the ECtHR has reasoned when confronted by stereotypes (Part II). Next, it analyses the anti-stereotyping reasoning of the U.S. Supreme Court (Part III) and its Canadian counterpart (Part IV). Two deceptively simple questions will form the *leitmotiv* throughout the comparison: (i) how do these courts conceive of stereotypes; and (ii) given that stereotyping is not necessarily always negative or problematic, how do these courts determine whether the application of a stereotype is invidious? Parts III and IV conclude by critiquing respectively the American and Canadian jurisprudence, in the belief that the Strasbourg Court can also learn a great deal

¹⁴ Changing stereotypes is a complicated and often long process. Psychologists do a lot of research on this topic. See, e.g., THE SAGE HANDBOOK OF PREJUDICE, STEREOTYPING AND DISCRIMINATION, *supra* note 4, at 491-595.

¹⁵ COOK & CUSACK, *supra* note 13; Mark S. Kende, *Gender Stereotypes in South African and American Constitutional Law: The Advantages of a Pragmatic Approach to Equality and Transformation*, 117 S. AFRICAN L. J. 745 (2000); Suk, *supra* note 11; Julie C. Suk, *From Antidiscrimination to Equality: Stereotypes and the Life Cycle in the United States and Europe*, 60 AM. J. COMP. L. 75 (2012).

¹⁶ The Honourable Madame Justice Claire L'Heureux-Dubé, *Beyond the Myths: Equality, Impartiality, and Justice*, 10 JOURNAL OF SOCIAL DISTRESS AND THE HOMELESS 87, 101 (2001).

¹⁷ See, e.g., Council of Europe/ECtHR, *Research Report: References to the Inter-American Court of Human Rights in the Case-Law of the European Court of Human Rights*, available at: http://www.echr.coe.int/Documents/Research_report_inter_american_court_ENG.pdf. However, the Strasbourg Court's use of U.S. Supreme Court jurisprudence has so far been "frugal". See Antenor Hallo de Wolf & Donald H. Wallace, *The Overseas Exchange of Human Rights Jurisprudence: The U.S. Supreme Court in the European Court of Human Rights*, 19 INT'L CRIM. JUSTICE REV. 287, 303 (2009). See also Erik Voeten, *Borrowing and Nonborrowing Among International Courts*, 39 THE JOURNAL OF LEGAL STUDIES 547 (2010).

from their less successful features. The last part reflects on what insights the ECtHR can borrow from the other side of the Atlantic (Part V).

Before proceeding some preliminary remarks are in order. First, the premise of this article is that legal reasoning matters, not just the end verdict. Fine verdicts can be based on flawed reasoning. Such is the case with many of the ECtHR judgments that will be discussed in this article. Second, the focus of this article is on the stereotyping concept in equal protection law generally. Many of the examples, however, will come from gender equality cases, because this is the area where the concept has gained most traction through the years.¹⁸

II. Stereotyping in Strasbourg – Analyzing the Achievements, Identifying the Issues

A) Introduction: Historical Development of the Stereotype Concept

Several of the Strasbourg Court's landmark discrimination cases concerned stereotyping. In *Marckx v. Belgium* (1979), for example, a case concerning the legal bond between a mother and her illegitimate child and the inheritance rights of that child, the Belgian authorities relied on the argument that unmarried mothers are often unwilling to take care of their offspring.¹⁹ Another example is *Abdulaziz, Cabales and Balkandali v. the UK* (1985), which concerned an immigration law that applied stricter rules to husbands who wanted to join their legally resident wives than to wives who wanted to join their husbands. The UK Government attempted to justify this rule by arguing that "men were more likely to seek work than women" and would therefore have a greater impact on the domestic labour market.²⁰ And in *Karlheinz Schmidt v. Germany* (1994), a case about fire brigade duty that was compulsory for men only, the German Government argued that "the legislature had taken account of the specific requirements of service in the fire brigade and the physical and mental characteristics of women. The sole aim which it had pursued in this respect was the protection of women."²¹

Although the Court found a violation of the non-discrimination provision (Article 14 of the European Convention on Human Rights; "ECHR"²²) in all three cases, it did not recognize stereotyping as

¹⁸ That seems true for the legal literature and for the U.S. case law. The Canadian case law on stereotypes, however, is less gender-oriented.

¹⁹ *Marckx v. Belgium*, 31 Eur. Ct. H.R. (ser. A) ¶ 39 (1979).

²⁰ *Abdulaziz, Cabales, and Balkandali v. United Kingdom* A 94 (1985); 7 Eur. H.R. Rep. 471, ¶ 75.

²¹ *Karlheinz Schmidt v. Germany*, 291 Eur. Ct. H.R. (ser. A) ¶ 27 (1994).

²² Article 14 ECHR provides that:

part of the dynamics that caused the discriminatory conduct. In *Marckx* the Court did reject the idea that unmarried women are less likely to want to take care of their child; it held that “such an attitude is not a general feature of the relationship between unmarried mothers and their children”.²³ But that is it. Stereotyping was not often seen as a problem.²⁴ In fact, individual judges sometimes made a point of agreeing with the stereotypes put forward by the Government.²⁵ The stereotype concept certainly played no role in the Court’s discrimination analysis. This is slowly starting to change. The Strasbourg Court seems increasingly aware that stereotyping can affect human rights. Nevertheless, the Court still has a long way to go. The following three paragraphs will examine and critique the relevant ECtHR case law.

B) How Does the Strasbourg Court Conceive of Stereotypes?

The Strasbourg Court defines discrimination as a difference in treatment that has no “objective and reasonable justification.”²⁶ When the Court uses anti-stereotyping reasoning in Article 14 analysis, it usually does so in its review of justifications. This choice makes sense if one takes a look at the Court’s archives, which includes many cases wherein Governments tried to justify discrimination on the basis of stereotypes.²⁷ Examples include *Ünal Tekeli v. Turkey* (2004), a case in which an applicant complained that, as a married woman, she was not allowed to use her maiden name on official documents.²⁸ The Turkish Government argued that women, who “are of a more delicate nature than men”, need to have

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

²³ *Marckx v. Belgium*, 31 Eur. Ct. H.R. (ser. A) ¶ 39 (1979).

²⁴ A well-known exception is the dissent in *Petrovic v. Austria* (1998), a case about parental leave: the Austrian government made such leave only available to mothers. The dissenters held: “The discrimination against fathers perpetuates this traditional distribution of roles and can also have negative consequences for the mother . . . traditional practices and roles in family life alone do not justify a difference in treatment of men and women.” *Petrovic v. Austria* 1998-II; (2001) 33 Eur. H.R. Rep. 14 (Bernhardt J. and Spielmann J., dissenting).

²⁵ See, e.g., *Karlheinz Schmidt v. Germany*, 291 Eur. Ct. H.R. (ser. A) (1994) (Morenilla J. concurring: “I think that the physical difference between the two sexes is a ‘weighty’ consideration justifying a difference of treatment by reason of the fact that certain tasks which require extreme physical efforts are ordinarily more easily accomplished by men than women, whilst the risk to health is greater for women.”).

²⁶ See, e.g., *Chassagnou and Others v. France* [GC], App. Nos. 25088/94, 28331/95 and 28443/95, ECHR 1999-III, ¶ 91.

²⁷ See, e.g., *Marckx v. Belgium*, 31 Eur. Ct. H.R. (ser. A)(1979); *Abdulaziz, Cabales, and Balkandali v. United Kingdom* A 94 (1985); 7 Eur. H.R. Rep. 471; *Inze v. Austria* A 126 (1987); 10 Eur. H.R. Rep. 394 (1988); *Karlheinz Schmidt v. Germany*, 291 Eur. Ct. H.R. (ser. A)(1994); *Kiyutin v. Russia*, App. No. 2700/10, 53 Eur. H.R. Rep. 26 (2011).

²⁸ *Ünal Tekeli v. Turkey*, App. No. No.29865/96, 16 November 2004, 42 Eur. H.R. Rep. 53 (2006).

their position in the family protected and that it is therefore necessary that they take on the surname of their husband.²⁹ Another example is *Alajos Kiss v. Hungary* (2010), a case concerning the automatic disenfranchisement of people who have a guardian appointed to them.³⁰ The Hungarian Government claimed that adults who have been placed under guardianship lack the capacity to exercise their right to vote, and that they should therefore be deprived of this right.³¹

Thus far, the judgment that boasts the richest anti-stereotyping reasoning is *Konstantin Markin v. Russia* (2012).³² The case concerned a military serviceman who complained that he was not able to take extended parental leave, while such leave is available to servicewomen. The Grand Chamber unequivocally announces that it will not accept stereotype-based justifications for discriminatory conduct. It holds that “gender stereotypes, such as the perception of women as primary child-carers and men as primary breadwinners, cannot, by themselves, be considered to amount to sufficient justification for a difference in treatment, any more than similar stereotypes based on race, origin, colour or sexual orientation.”³³ From an anti-stereotyping perspective, it is a major victory that the Grand Chamber puts this so clearly.³⁴ In this case, the Strasbourg Court names what is arguably the most prevalent gender-role stereotype, namely “the perception of women as primary child-carers and men as primary breadwinners”.³⁵ The Court holds that States “may not impose traditional gender roles and gender stereotypes.”³⁶ Konstantin Markin is a male applicant, but the Court emphasizes that gender-role stereotyping hurts both men and women, as these stereotypes are “disadvantageous both to women’s careers and to men’s family life.”³⁷ Article 14 ECHR is an accessory right, meaning that it has no independent existence and is applicable only in relation to the rights set forth in the Convention. Thus, in *Markin*, the Grand Chamber found a violation of Article 14 in conjunction with Article 8 ECHR (the right to respect for private and family life).³⁸

²⁹ *Id.* at ¶ 16. *See also* ¶ 46.

³⁰ *Alajos Kiss v. Hungary*, App. No. 38832/06, 20 May 2010. *Alajos Kiss* is technically not a discrimination case (the Court only found a violation of Article 3 Protocol 1), but it was reasoned as such.

³¹ *Id.* at ¶ 26.

³² *Konstantin Markin v. Russia* (GC), App. No. 30078/06, 56 Eur. H.R. Rep. 8 (2013).

³³ *Id.* at ¶ 143.

³⁴ Moreover, since the Court also mentions race, color, origin and sexual orientation, this holding will surely be invoked by applicants in a wide range of cases.

³⁵ *Konstantin Markin v. Russia* (GC), App. No. 30078/06, 56 Eur. H.R. Rep. 8, ¶ 143 (2013).

³⁶ *Id.* at ¶ 142; *Ünal Tekeli v. Turkey*, App. No. No.29865/96, 16 November 2004, 42 Eur. H.R. Rep. 53, ¶ 63 (2006); *Staatkundig Gereformeerde Partij v. Netherlands* (Inadm.), App. No. 58369/10, 10 July 2012, ¶ 73.

³⁷ *Konstantin Markin v. Russia* (GC), App. No. 30078/06, 56 Eur. H.R. Rep. 8, ¶ 141 (2013).

³⁸ Article 8(1) states: “Everyone has the right to respect for his private and family life, his home and his correspondence.”

However, much of the Court's anti-stereotyping reasoning appears in Article 8 analysis (Article 8 alone, not in conjunction with Article 14). In *Aksu v. Turkey* (2012) the Grand Chamber says explicitly that stereotyping can infringe on the right to private life:

[A]ny negative stereotyping of a group, when it reaches a certain level, is capable of impacting on the group's sense of identity and the feelings of self-worth and self-confidence of members of the group. It is in this sense that it can be seen as affecting the private life of members of the group.³⁹

Aksu concerns two State-sponsored publications: a dictionary and a book entitled "The Gypsies of Turkey", written by an associate professor. Both of these publications contained derogatory stereotypes of Roma. The dictionary contained entries such as "Gypsiness - (metaphorically) being miserly or greedy"⁴⁰ and more of the same. The other book contained passages that suggested that Roma make their living by stealing.⁴¹ Mr. Aksu, a Roma, complained that such remarks and expressions debased the Roma community. The Court recognizes that what is at stake here is "negative stereotyping" (see the quote above), but it makes no effort to unpack what these stereotypes are exactly and why they should be considered injurious.

The same picture emerges in other cases: when the Court names stereotypes, it often does so in the context of Article 8, but only very cursorily. In *V.C. v. Slovakia*, for example,⁴² a case about the involuntary sterilization of a Roma woman, the Court notes the Council of Europe Commissioner for Human Rights' view that Roma women are particularly at risk of suffering involuntary sterilization "due, *inter alia*, to the widespread negative attitudes towards the relatively high birth rate among the Roma compared to other parts of the population, often expressed as worries of an increased proportion of the population living on social benefits."⁴³ The Court mentions the Commissioner's view, but does not further discuss these "negative attitudes". Underlying such attitudes is a widely held stereotype that Roma are parasitic and that they therefore want to live on social benefits.⁴⁴ In the examination of the merits there is no discussion of the historical roots of these attitudes, nor is there a discussion of the

³⁹ *Aksu v. Turkey* (GC), App. Nos. 4149/04; 41029/04, 15 March 2012, ¶ 58.

⁴⁰ *Id.* at ¶ 28.

⁴¹ *Id.* at ¶ 12.

⁴² Another example where this occurred to some extent is *Yordanova v. Bulgaria*, App. No. 25446/06, 24 April 2012, ¶ 142 (a case about the forced eviction of a Roma settlement).

⁴³ *V.C. v. Slovakia*, App. No. 18968/07, 8 November 2011, ¶ 146.

⁴⁴ Dimitrina Petrova, *The Roma: Between a Myth and the Future*, 70 SOCIAL RESEARCH 111, 130 (2003).

ways in which the Government has in the past actively promoted such negative stereotypes about Roma. It falls to the only dissenting Judge, namely Judge Mijović, to point out that “there was a general State policy of sterilisation of Roma women under the communist regime (governed by the 1972 Sterilisation Regulation), the effects of which continued to be felt up to the time of the facts giving rise to the present case.”⁴⁵

C) When Does the ECtHR Consider Stereotypes Invidious?

A close reading of the ECtHR’s scant reasoning on stereotypes reveals that the Court considers stereotypes invidious when they are either untrue or based on prejudice (or a combination of both). In order to make that assessment, the Court regularly relies on a broader European consensus or on international human rights law materials.⁴⁶ For example, in the case about a Roma woman who was forcibly sterilized, *V.C. v. Slovakia*, the Court refers to a report by the Council of Europe Commissioner for Human Rights,⁴⁷ to establish that the negative attitudes concerning high birth rates among the Roma are worrisome.⁴⁸

The Court has several times been confronted with untrue stereotypes. When this happened, the Court usually said so (without necessarily using the word “stereotype”). Examples include the above-mentioned *Marckx* case, wherein the Court pointed out that unmarried mothers are not less likely to care for their child than married mothers.⁴⁹ Another example is *Kiyutin v. Russia* (2011), the case of a man who was refused a Russian residence permit solely because he was HIV-positive.⁵⁰ The Court names the stereotype that HIV-positive people will engage in unsafe sex and denounces it as false:

Excluding HIV-positive non-nationals from entry and/or residence in order to prevent HIV transmission is based on the assumption that they will engage in specific unsafe behaviour and

⁴⁵ *V.C. v. Slovakia*, App. No. 18968/07, 8 November 2011 (Mijović, J., dissenting).

⁴⁶ See, e.g., *id* at. ¶ 64-65; *Ünal Tekeli v. Turkey*, App. No. No.29865/96, 16 November 2004, 42 Eur. H.R. Rep. 53, ¶ 59-61 (2006); *Konstantin Markin v. Russia* (GC), App. No. 30078/06, 56 Eur. H.R. Rep. 8, ¶ 140 (2013); *Vejdeland and Others v. Sweden*, App. No. 1813/07, 9 February 2012 (Spielmann J. and Nussberger J. concurring, ¶ 6).

⁴⁷ CommDH(2003)12, ¶ 37.

⁴⁸ *V.C. v. Slovakia*, App. No. 18968/07, 8 November 2011, ¶ 146.

⁴⁹ *Marckx v. Belgium*, 31 Eur. Ct. H.R. (ser. A) ¶ 39 (1979). See *supra* text accompanying note 23.

⁵⁰ *Kiyutin v. Russia*, App. No. 2700/10, 53 Eur. H.R. Rep. 26 ¶ 63 (2011).

that the national will also fail to protect himself or herself. This assumption amounts to a generalisation which is not founded in fact.⁵¹

Similarly, in *Konstantin Markin* the Court does not accept the stereotype that women ought to be caregivers and the inference that is drawn from this stereotype, namely that the caring role of fathers is less important than that of mothers in the period of a child's life in which parents are eligible for parental leave.⁵² The Court implies that this stereotype is untrue.⁵³

When the Court is confronted with stereotypes that are based on prejudice, it has used the term "negative attitudes". For example, negative attitudes in the form of "a predisposed bias on the part of a heterosexual majority against a homosexual minority" cannot justify restricting the rights of gay people.⁵⁴ The Court has used this reasoning with great effect in cases about the participation of homosexuals in the military⁵⁵ and in cases about the criminalization of sexual conduct between men.⁵⁶ In *Kiyutin*, the Court explores how stereotypes can arise from a mixture of ignorance and prejudice – resulting in beliefs that are harmful both because they are untrue and because they create stigma and discrimination:

HIV infection has been traced back to behaviours – such as same-sex intercourse, drug injection, prostitution or promiscuity – that were already stigmatised in many societies, creating a false nexus between the infection and personal irresponsibility and reinforcing other forms of stigma and discrimination, such as racism, homophobia or misogyny.⁵⁷

Importantly, however, the Court always performs a proportionality analysis – whether the Court addresses stereotypes under Article 8 or under Article 14 (in conjunction with another provision from

⁵¹ *Id.* at ¶ 68.

⁵² *Konstantin Markin v. Russia* (GC), App. No. 30078/06, 56 Eur. H.R. Rep. 8, ¶ 132 (2013).

⁵³ *Id.*

⁵⁴ *Lustig-Prean and Beckett v. United Kingdom*, App. Nos. 1417/96 and 32377/96, 27 September 1999, 29 Eur. H.R. Rep. 548, ¶ 90 (2000); *Smith and Grady v. United Kingdom*, App. Nos. 33985/96 and 33986/96, 27 September 1999, 29 Eur. H.R. Rep. 493, ¶ 97 (2000).

⁵⁵ *Id.* For an insightful discussion of these cases see Michael Kavey, *The Public Faces of Privacy: Rewriting Lustig-Prean and Beckett v. United Kingdom*, in *DIVERSITY AND EUROPEAN HUMAN RIGHTS: REWRITING JUDGMENTS OF THE ECHR* 293 (Eva Brems ed., 2012).

⁵⁶ *L. and V. v. Austria*, App. Nos. 39392/98 and 39829/98, 9 January 2003, 36 Eur. H.R. Rep. 55, ¶ 52 (2003).

⁵⁷ *Kiyutin v. Russia*, App. No. 2700/10, 53 Eur. H.R. Rep. 26 ¶ 64 (2011). See also about HIV-based prejudice *I.B. v. Greece*, App. No. 552/10, 3 October 2013, ¶ 81.

the Convention).⁵⁸ This means that even (*prima facie*) invidious stereotyping can be justified in the eyes of the Court; provided it is proportional to the legitimate aim sought to be realized. The proportionality analysis is where the Court deploys its margin of appreciation doctrine.⁵⁹ Put briefly, the margin of appreciation is a “doctrine of judicial deference”;⁶⁰ the width of the margin of appreciation determines how strictly the Court will scrutinize a Government’s conduct.

The Strasbourg Court has accepted two types of justifications for stereotypes. Firstly, stereotyping can be justified by an important countervailing public interest. In *Aksu*, the Grand Chamber countenanced the State’s lack of interference in the publication of a book and a dictionary that contained derogatory stereotypes of Roma because it held that the rights and interests of others (in being provided with information and in academic freedom of expression) weighed more heavily.⁶¹ Secondly, stereotyping can be justified when it serves to correct factual inequalities. For example, in several cases concerning the provision of social benefits the Court has in essence held that gender role stereotyping can be allowed if it serves to correct a factual inequality between men and women.⁶² Take *Runkee and White v. UK*, a case that was brought by applicants who complained that, as men, they were not eligible for “widow’s benefits” upon the deaths of their wives.⁶³ The Strasbourg Court notes in this judgment that the British widow’s pension “was first introduced in 1925, in recognition of the fact that older widows, as a group, faced financial hardship and inequality because of the married woman’s traditional role of caring for husband and family in the home rather than earning money in the workplace.”⁶⁴ The Court therefore considers that this pension “was intended to correct ‘factual inequalities’ between older widows, as a group, and the rest of the population”; as such, “this difference in treatment was reasonably and objectively justified.”⁶⁵ Social benefits cases such as these illustrate

⁵⁸ For a more general analysis of the Court’s analysis of justifications under Article 14 ECHR, see, e.g., Aaron Baker, *Proportional, Not Strict, Scrutiny: Against a U.S. “Suspect Classifications” Model Under Article 14 ECHR in the UK*, 56 AM. J. COMP. L. 847, 854-857 and 882-889 (2008).

⁵⁹ See generally, e.g., ANDREW LEGG, THE MARGIN OF APPRECIATION IN INTERNATIONAL HUMAN RIGHTS LAW: DEFERENCE AND PROPORTIONALITY (2012); George Letsas, *Two Concepts of the Margin of Appreciation*, 26 OXFORD J. OF LEGAL STUD. 705 (2006).

⁶⁰ LEGG, *supra* note 59, at 1.

⁶¹ *Aksu v. Turkey* (GC), App. Nos. 4149/04; 41029/04, 15 March 2012, ¶¶ 69-71 and 82-84.

⁶² See, e.g., *Stec v. United Kingdom*, App. No. 65731/01, 12 April 2006, 43 Eur. H.R. Rep. 47, ¶¶ 61 and 66 (2006); and *Andrle v. Czech Republic*, App. No. 6268/08, 17 February 2011, ¶¶ 53-60.

⁶³ *Runkee and White*, App. Nos. 42949/98 and 53134/99, 10 May 2007.

⁶⁴ *Id.* at ¶ 37.

⁶⁵ *Id.* at ¶ 40.

that the ECtHR is quite tolerant of paternalistic stereotypes – much more so than the U.S. Supreme Court, as the next part will discuss.⁶⁶

D) Critique of the ECtHR's Treatment of Stereotypes

The Court's treatment of stereotypes includes two serious flaws. The first and most basic problem is that the Court often neglects to *name* stereotypes. This is a problem because the Court's ability to address invidious stereotyping depends on its willingness to identify stereotypes.⁶⁷ You cannot change a reality without naming it.⁶⁸ Both in cases wherein stereotyping *implicitly* played a part,⁶⁹ and in cases where the Government *explicitly* referred to stereotypes,⁷⁰ the Court has generally kept quiet. True, in several Article 14 cases the Court has withheld its consent to differences in treatment based on invidious stereotypes. But it has usually done so without naming the stereotypes in question. In *Salgueiro da Silva Mouta v. Portugal* (1999), for example, the Lisbon Court of Appeal withheld child custody from a father who was living together with another man, because he "had definitively left the marital home to go and live with a boyfriend, a decision which is not normal according to common criteria"; and the child should live in "a traditional Portuguese family, which is certainly not the set-up her father has decided to enter into".⁷¹ The Court of Appeal thus imprinted the false stereotype that homosexuals cannot be good fathers and simultaneously the prescriptive stereotype that proper fathers should not live with their male partners. The Strasbourg Court subsequently found a violation of Article 8 in conjunction with Article 14, but it did not explain what was wrong with the reasoning of the Lisbon Court. Similarly, in other stereotyping cases the sum of the ECtHR's reasoning consisted in the remark that the Governments in question did not bring forward valid reasons.⁷² The result of such sparse reasoning is that Council of Europe Member States learn nothing about the harm that stereotyping does. The Court eschews its pedagogical role.

⁶⁶ See *infra* Part III.D.

⁶⁷ COOK & CUSACK, *supra* note 13, at 39-70; Timmer, *supra* note 13, at 720-722.

⁶⁸ Cf. CATHARINE MACKINNON, WOMEN'S LIVES, MEN'S LAWS 89 (2005) ("[Y]ou can't change a reality you can't name.")

⁶⁹ See, e.g., *Rantsev v. Cyprus and Russia*, App. No. 25965/04, 7 January 2010, 51 Eur. H.R. Rep. 1 (2010) (a sex trafficking case in which the Court does not discuss the underlying stereotype that women on an artiste visa in Cyprus are the (sexual) property of their employers). For discussion see Timmer, *supra* note 13, at 730-734.

⁷⁰ See, e.g., *M. and Others v. Italy and Bulgaria*, App. No. 40020/03, 31 July 2012 (case concerning the kidnapping of a Roma girl and the police's response to that. The Government relies on the stereotypes that Roma women are untruthful and that Roma women are commonly abused by their family).

⁷¹ *Salgueiro da Silva Mouta v. Portugal*, App. No. 33290/96, 21 December 1999, ¶ 14.

⁷² See, e.g., *Schuler-Zraggen v. Switzerland*, App. No. 14518/89, 16 Eur. H. R. Rep. 405 (1993), ¶ 67; *Zarb Adami v. Malta*, App. No. 17209/02, 44 Eur. H.R. Rep. 3, ¶ 82 (2006).

This leads to the second problem with the Court's treatment of stereotypes, namely that the Court but seldom analyzes stereotyping as a discrimination issue. Essentially, the harm of stereotyping is that it justifies and reinforces discrimination: stereotypes anchor structural inequality. The Court's legal reasoning should capture this. In order to release the potential of the stereotype concept, the Court will have to start recognizing that stereotyping can be a form of wrongful unequal treatment.⁷³ It is only by framing invidious stereotyping as a discrimination issue, that the Court can transcend the level of the individual claimant and address the wider harmful implications of such stereotyping.⁷⁴ To be sure, the Grand Chamber justly holds in *Aksu* that negative stereotyping can impact on an individual's private life.⁷⁵ But only by analyzing such stereotyping from an anti-discrimination perspective can the Court address the wider impact it has on groups (such as Roma, people with a mental disability, or women). Stereotyping is not just a private experience; it is chiefly a social experience.⁷⁶ It is that social experience/problem that the Court can address and contest with an Article 14 analysis.

Specifically worrisome is that anti-stereotyping reasoning has no place (yet) in the Court's review of whether an impugned measure falls under the *scope* of Article 14. While it is a positive development that the Court has now recognized that gender stereotypes cannot justify differential treatment,⁷⁷ a focus on stereotypes should not remain confined to the second stage of the Court's Article 14 analysis. Otherwise many stereotyping cases will not be able to pass the gates of Article 14. The most salient example of a case that clearly concerns invidious stereotyping, but which the Court refused to examine under Article 14, is *Aksu v. Turkey* (the judgment about derogatory stereotypes of Roma in a Government-sponsored book and dictionary).⁷⁸ The Grand Chamber's reasoning is as follows: "the Court observes that the case does not concern a difference in treatment, and in particular ethnic

⁷³ Cf. Sophia Moreau, *The Wrongs of Unequal Treatment*, 54 U. TORONTO L. J. 291, 297-303 (2004).

⁷⁴ Judge Mijović made a similar point in her dissenting opinion in *V.C. v. Slovakia*: "[f]inding violations of Articles 3 and 8 alone in my opinion reduces this case to the individual level . . . the sterilisations performed on Roma women were not of an accidental nature, but relics of a long-standing attitude towards the Roma minority in Slovakia." *V.C. v. Slovakia*, App. No. 18968/07, 8 November 2011 (Mijović J. dissenting).

⁷⁵ *Aksu v. Turkey* (GC), App. Nos. 4149/04; 41029/04, 15 March 2012. See *supra* Part II.B.

⁷⁶ See, e.g., GLENN C. LOURY, *THE ANATOMY OF RACIAL INEQUALITY* (2002) (about the experience of African-Americans with stereotypes); SANDER L. GILMAN, *DIFFERENCE AND PATHOLOGY: STEREOTYPES OF SEXUALITY, RACE AND MADNESS* 150-162 (1985) (about stereotypes of Jewish people).

⁷⁷ *Konstantin Markin v. Russia* (GC), App. No. 30078/06, 56 Eur. H.R. Rep. 8 (2013). See *supra* Part II.B for discussion.

⁷⁸ *Aksu v. Turkey* (GC), App. Nos. 4149/04; 41029/04, 15 March 2012. This despite the fact that the Chamber judgment *had* examined the case under Article 14. See *Aksu v. Turkey*, App. Nos. 4149/04 41029/04, 27 July 2010. Other examples include *V.C. v. Slovakia*, App. No. 18968/07, 8 November 2011 (see *supra* text note 74); *M. and Others v. Italy and Bulgaria*, App. No. 40020/03, 31 July 2012; *Yordanova v. Bulgaria*, App. No. 25446/06, 24 April 2012, ¶ 142 (a case about the forced eviction of a Roma settlement).

discrimination, as the applicant has not succeeded in producing *prima facie* evidence that the impugned publications had a discriminatory intent or effect.”⁷⁹

This interpretation of discrimination is too narrow.⁸⁰ By equating discrimination with differential treatment, the Court misses the point here. The wrongs of stereotyping are not comparative in nature: they do not derive from a comparison with another group which has been treated better.⁸¹ The wrong in *Aksu* is not that the Roma have been treated differently than other groups, but that the remarks in these books are stigmatizing and demeaning in and of themselves. Especially the contested dictionary is a striking (and literal!) example of Catherine MacKinnon’s insight that “subordination is ‘doing somebody else’s language.’”⁸² It is highly problematic that the Court is unable to “see” this as an instance of discrimination. That is not to say that the Convention was violated in the *Aksu* case: the State’s interest in protecting freedom of expression provides a strong justification for its conduct. But the discussion about justifications properly belongs to the second stage of the analysis: the complaint of Mr Aksu should first be recognized under the scope of Article 14.

In contrast with the case law of the ECtHR, the next parts will show that the American and Canadian Supreme Courts do analyze stereotypes under their respective constitutional equal treatment provisions. Across the Atlantic, stereotyping is definitely – arguably even paradigmatically – considered a discrimination issue.

III. Stereotype as a Concept in American Equal Protection Law

A) Introduction: Historical Development of the Stereotype Concept

The anti-stereotyping principle has a long history in U.S. Constitutional equal protection law. During the civil rights movement of the 1950s and 1960s, lawyers advocating for racial equality drew on the

⁷⁹ *Aksu v. Turkey* (GC), App. Nos. 4149/04; 41029/04, 15 March 2012, ¶ 45.

⁸⁰ That is not the only reason why this holding is troublesome: it is also striking that the Court does not recognize mental suffering caused by misrecognition as a discriminatory effect.

⁸¹ Sophia Moreau, *Equality Rights and the Relevance of Comparator Groups*, 5 JOURNAL OF LAW AND EQUALITY 81, 88-92 (2006). See also Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728, 779-91 (2011); Timmer, *supra* note 13, at 723-24.

⁸² CATHERINE MACKINNON, ONLY WORDS 25 (1993).

concept of stereotyping to show what was wrong with segregation.⁸³ By the end of the 1960s, people in the women's rights movement applied the concept in the domain of gender equality.⁸⁴ Justice Ruth Bader Ginsburg, then professor and head of the Women's Rights Project at the American Civil Liberties Union (ACLU), convinced the Supreme Court to include the anti-stereotyping principle in its sex-based equal protection law in the 1970s.⁸⁵ The way Ginsburg formulated it, the anti-stereotyping principle combats gender roles: she argued that the law had no business in enforcing the traditional separate spheres ideology, where men are expected to be breadwinners and women to be caregivers.⁸⁶ This theme strikes a deep chord in American legal consciousness because of the widely known and (by now) infamous separate opinion of Justice Bradley in *Bradwell v. Illinois* (1873).⁸⁷ Lawyer Mira Bradwell was refused a license to practice law because she was a woman. In a passage that most U.S.-trained lawyers will be familiar with, Justice Bradley justified this restriction because:

The civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. . . . The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator.⁸⁸

In the past few decades, the Supreme Court has regularly cited this opinion to illustrate what modern Constitutional equal protection law is all about: providing protection against measures based on this kind of ideology.⁸⁹ It has been argued that "[s]tereotyping is the central evil that the Court's equal protection doctrine seeks to prevent."⁹⁰

The anti-stereotyping principle is, however, by no means limited to U.S. Constitutional law. Jurisprudence about specific anti-discrimination legislation – notably Title VII of the Civil Rights Act ('Title

⁸³ Louis Lusky, *The Stereotype: Hard Core of Racism*, 13 Buff. L. Rev. 450 (1963-1964). About this history see Franklin, *supra* note 2, at 107-108.

⁸⁴ Franklin, *supra* note 2, at 108-114. See also Barbara Kirk Cavanaugh, Note: "A Little Dearer Than His Horse": *Legal Stereotypes and the Feminine Personality*, 6 HARV. C.R.-C.L. L. REV. 260 (1971).

⁸⁵ For a thorough account of this history see Franklin, *supra* note 2. See also Siegel & Siegel, *supra* note 12.

⁸⁶ Franklin, *supra* note 2, at 119-142.

⁸⁷ 83 U.S. (16 Wall.) 130 (1873).

⁸⁸ *Id.* at 141 (Bradley, J. concurring).

⁸⁹ See, e.g., *Frontiero v. Richardson*, 411 U.S. 677, 684-685 (1973); *Mississippi University for Women v. Hogan*, 458 U.S. 718, 735 (1982); *J.E.B. v. Alabama*, 511 U.S. 127, 133 (1994); and *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721, 729 (2003).

⁹⁰ David H. Gans, Note: *Stereotyping and Difference: Planned Parenthood v. Casey and the Future of Sex Discrimination Law*, 104 YALE L.J. 1875, 1876 (1994-1995).

VII'),⁹¹ the Age Discrimination in Employment Act ('ADEA')⁹² and Americans with Disabilities Act ('ADA')⁹³ – also regularly includes anti-stereotyping reasoning.⁹⁴ Nowadays, the front line of the anti-stereotyping principle seems to lie in the domain of sexual orientation and gender identity discrimination.⁹⁵ All combined, the U.S. case law on stereotyping is vast. This article will therefore restrict its focus to the Supreme Court's interpretation of Constitutional equal protection law. It does not aim to give a comprehensive overview of the case law. Instead, the following paragraphs offer a conceptual analysis of the Supreme Court's anti-stereotyping reasoning.

B) How Does the U.S. Supreme Court Conceive of Stereotypes?

Building on the work of other commentators, notably K. Anthony Appiah, it is submitted that there are four types of stereotype in U.S. anti-discrimination law.⁹⁶ First, there are *role-typing stereotypes*:⁹⁷ these are assumptions about the proper roles or behavior of people who belong to a certain group (e.g., women are homemakers).⁹⁸ Second are *false stereotypes*: they include stereotypes that are based on prejudice, whether consciously or unconsciously held (e.g., African-Americans lack intelligence), *as well as* stereotypes that are less clearly negative but are empirically/statistically unsound (e.g., women will regret having an abortion). Third are *statistical stereotypes*: this is the kind of stereotype that reflects a statistical truth about the group as a whole, but which does not accurately reflect the situation of the individual. They are thus largely accurate but overbroad assumptions (e.g., men have more physical

⁹¹ 42 U.S.C. §§2000e-2000e-17 (2006 & Supp. IV 2011).

⁹² 29 U.S.C. §§621-634 (2006).

⁹³ 42 U.S.C. §12101 (2006).

⁹⁴ This has certainly impacted on Constitutional equal protection analysis. Meredith Render has made a comparison of anti-gender-stereotyping reasoning under the Constitution and under Title VII. Meredith M. Render, *Gender Rules*, 22 YALE J. L. & FEMINISM 133 (2010). See also Mary Anne Case, "The Very Stereotype the Law Condemns": *Constitutional Sex Discrimination Law As a Quest For Perfect Proxies*, 85 CORNELL L. REV. 1447, 1463-1464 (1999-2000).

⁹⁵ See, e.g., Cary Franklin, *Sex, Stereotyping, and Same-Sex Marriage*, BALKINIZATION (Jan. 12, 2013, 10:35 AM), <http://balkin.blogspot.be/2013/01/sex-stereotyping-and-same-sex-marriage.html>; Zachary A. Kramer, *Of Meat and Manhood*, 89 WASH. U. L. REV. 287 (2011); Deborah A. Widiss, Elizabeth L. Rosenblatt, Douglas NeJaime, *Exposing Sex Stereotypes in Recent Same-Sex Marriage Jurisprudence*, 30 HARV. J.L. & GENDER 461 (2007).

⁹⁶ Several commentators have developed typologies of the concept of stereotyping in equal protection law. See K. Anthony Appiah, *Stereotypes and the Shaping of Identity*, 88 CAL. L. REV. 41, 47-48 (2000); Render, *supra* note 94, at 143-163. I find Appiah's typology especially insightful. I broadly agree with the three forms of stereotype (statistical, false, and normative) that he has identified, but this article adds role-typing as a separate category. Also, as will become apparent in this paragraph and the next one, the present analysis of why these stereotypes are considered invidious in American anti-discrimination law partly differs from Appiah's.

⁹⁷ The term "role-typing" comes from the case law itself. See *Stanton v. Stanton* 421 U.S. 7, 15 (1975).

⁹⁸ See also COOK & CUSACK, *supra* note 13, at 28-29 (describing sex role stereotypes).

strength than women). And finally the case law includes *prescriptive stereotypes*: these require a certain form of behavior or standard of appearance from certain groups of people (e.g., women should dress femininely). This section will discuss these forms of stereotype one by one, with the emphatic caveat that many stereotypes will fall under multiple headings at the same time.

Role-typing stereotypes are the most prevalent form of stereotype in the U.S. case law.⁹⁹ In fact, anti-role-typing reasoning is foundational for the whole anti-stereotyping jurisprudence. This article has elected to label role-typing as one of the four forms of stereotype, but concerns over role-typing actually seem to animate the whole jurisprudence. Especially gender-role stereotyping has often been condemned by the Court, following Justice Ginsburg's campaign in the 1970s. Gender-based classifications are not allowed when they are based upon "assumptions about the proper roles of men and women."¹⁰⁰ For example, the Court has identified as stereotypical the ideas that wives are dependent on the income of their husbands;¹⁰¹ that nursing is a female job;¹⁰² and that caring for family members is women's work.¹⁰³ "No longer", the Court has held, "is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas."¹⁰⁴ Sex roles have the effect of putting men and women in separate spheres and keeping them there: when they are instantiated into law, the Court recognizes, stereotypes become a "self-fulfilling prophecy"¹⁰⁵ or a "self-fulfilling cycle of discrimination."¹⁰⁶

But not only role-typing on the ground of gender is forbidden: a similar distrust of role-typing informs the Supreme Court's jurisprudence on age discrimination and disability discrimination. One example is the well-known disability case of *Olmstead v. Zimring*, which concerned the question whether the ADA requires placing mentally disabled people, whenever this is possible, in community-based programs rather than in institutions. Here, Justice Ginsburg wrote for the majority: "institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life."¹⁰⁷ The stereotype that Justice Ginsburg refers to is simultaneously false and a role-type.

⁹⁹ For a thorough overview of the case law see Franklin, *supra* note 2.

¹⁰⁰ *Mississippi University for Women v. Hogan*, 458 U.S. 718, 726 (1982).

¹⁰¹ *See, e.g., Frontiero v. Richardson*, 411 U.S. 677 (1973).

¹⁰² *Mississippi University for Women v. Hogan*, 458 U.S. 718, 729-730 (1982).

¹⁰³ *See, e.g., Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003).

¹⁰⁴ *Stanton v. Stanton* 421 U.S. 7, 14-15 (1975).

¹⁰⁵ *Mississippi University for Women v. Hogan*, 458 U.S. 718, 730 (1982); *U.S. v. Virginia*, 518 U.S. 515, 543 (1996).

¹⁰⁶ *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721, 736 (2003).

¹⁰⁷ *Olmstead v. Zimring*, 527 U.S. 581, 660 (1999).

Next are *false stereotypes*. Firstly, stereotypes can be false because they lack empirical support. Take *Gonzales v. Carhart* (2007); the case that upheld the ban on late-term abortions known as “partial birth abortion”.¹⁰⁸ Without actually using the term “stereotype”, Justice Ginsburg said there is no “reliable evidence” for the idea that “[w]omen who have abortions come to regret their choices, and consequently suffer from ‘[s]evere depression and loss of esteem.’”¹⁰⁹ This idea was part of the majority’s justification for upholding the statute, which restricted access to abortion.¹¹⁰ Justice Ginsburg includes a long list of references to psychological and medical literature that contests the idea that “having an abortion is any more dangerous to a woman’s long-term mental health than delivering and parenting a child that she did not intend to have.”¹¹¹ Another example is found in *Hazen Paper v. Biggens*, a case about age discrimination, where the Supreme Court held: “It is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with old age.”¹¹² Age discrimination, it continued, is “based in large part on stereotypes unsupported by objective fact.”¹¹³ Secondly, stereotypes can also be false in the sense that they are grounded in prejudice. The paradigmatic example in the U.S. is race-based stereotypes.¹¹⁴ Stereotypes that are overtly based on prejudice are nowadays by and large excised from the law, but they have occasionally surfaced in recent decades, for example in cases about jury selection.¹¹⁵

Third are *statistical stereotypes*. These are the kinds of stereotype that are statistically true for the group as a whole, but not for a specific individual. The Supreme Court has long recognized that beliefs about groups of people can be stereotypes even if there is statistical truth to them.¹¹⁶ The Court often invalidates statistical stereotypes when they are simultaneously a form of role-typing. Take, for example, the case of *Weinberger v. Wiesenfeld* (1975), a case that concerned a man who had earned significantly less than his wife. When his wife died Wiesenfeld tried to claim survivor’s benefits, which

¹⁰⁸ Partial-Birth Abortion Ban Act, 18 U.S.C. § 1531 (2003).

¹⁰⁹ *Gonzales v. Carhart*, 550 U.S. 124, 183 (2007) (Ginsburg J., dissenting).

¹¹⁰ *Id.* at 159.

¹¹¹ *Id.* at 183 n 7 (Ginsburg J., dissenting).

¹¹² *Hazen Paper v. Biggens*, 507 U.S. 604, 610 (1993).

¹¹³ *Id.* at 610-611.

¹¹⁴ Lusky, *supra* note 83.

¹¹⁵ *See, e.g.*, *J.E.B. v. Alabama*, 511 U.S. 127, 128 and 130-131 (1994) (about gender-based peremptory challenges of jurors); *Batson v. Kentucky*, 476 U.S. 79 (1986) (about race-based peremptory challenges); *Miller-El v. Dretke*, 545 U.S. 231, 237-238 (2005).

¹¹⁶ *See, e.g.*, *Weinberger v. Wiesenfeld*, 420 U.S. 636, 645 (1975); *Craig v. Boren*, 429 U.S. 190, 201 (1976); *J.E.B. v. Alabama*, 511 U.S. 127, 139 (1994). These cases concern gender equality, but sections of the Supreme Court have later confirmed this in other areas. *See e.g.*, *Kentucky Retirement Systems v. E.E.O.C.*, 554 U.S. 135, 162 (2008) (Kennedy, Scalia, Ginsburg and Alito J. dissenting).

were denied him because he was a man (and therefore supposed to be the breadwinner). The Court held that:

Obviously, the notion that men are more likely than women to be the primary supporters of their spouses and children is not entirely without empirical support. . . . But such a gender-based generalization cannot suffice to justify the denigration of the efforts of women who do work and whose earnings contribute significantly to their families' support.¹¹⁷

Moreover, the case of *U.S. v. Virginia Military Institute* (1996) (“VMI”) shows that the Court is capable of seeing and dismantling statistical stereotypes even when they are based on “inherent”/physical differences.¹¹⁸ *VMI* concerned the exclusion of women from a State-run military college. The State justified this by claiming that women were by their nature unsuited to the “adversative model” reigning at the institute.¹¹⁹ The majority of the Court, in an opinion authored by Justice Ginsburg, agreed that it might be true that – because of natural differences – most women are unsuited to VMI’s method of education. But this is not true of all women. Therefore, the Court held:

‘Inherent differences’ between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity. . . [Sex] classifications may not be used, as they once were . . . to create or perpetuate the legal, social, and economic inferiority of women.¹²⁰

VMI was consequently ordered to admit women. Part III.C will discuss when the Court considers statistical stereotypes invidious: clearly, not all statistical stereotypes are impermissible.

Fourth, and last, are the *prescriptive stereotypes*. These are stereotypes that stipulate a certain form of behavior or standard of appearance from individuals in order to conform to the norms associated with their group,¹²¹ or to conform to the norms of the dominant group (assimilation).¹²² This

¹¹⁷ Weinberger v. Wiesenfeld, 420 U.S. 636, 645 (1975).

¹¹⁸ U.S. v. Virginia, 518 U.S. 515 (1996).

¹¹⁹ *Id.* at 541.

¹²⁰ *Id.* at 533-534.

¹²¹ Appiah, *supra* note 96, at 48.

¹²² African-American women, for example, have been required to wear hairstyles that conform to the standards of whites. See Pauline Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365 (1991).

is a topic that has been extensively analyzed.¹²³ There are many examples in U.S. case law of such stereotypes, though mainly in the lower courts.¹²⁴ Most of these cases concern workplace discrimination and are litigated under Title VII. The major Supreme Court case on prescriptive gender stereotyping is *Price Waterhouse v. Hopkins*.¹²⁵ Despite her impressive work record, Hopkins was denied partnership in the accounting firm Price Waterhouse. Hopkins was thought to be too aggressive and not enough charming. The Court held that gender played a motivating part in Price Waterhouse's decision not to promote her. Several partners at the firm counseled Hopkins to "walk more femininely, talk more femininely, wear make-up, have her hair styled, and wear jewelry"¹²⁶ and take "a course in charm school".¹²⁷ The Court held that "stereotypical notions about women's proper deportment" influenced the employment decision.¹²⁸ "As for the legal relevance of sex stereotyping", the Court said, "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group."¹²⁹

C) When Does the U.S. Supreme Court Consider Stereotypes Invidious?

The U.S. anti-stereotyping principle has been called an "empty" heuristic.¹³⁰ Meredith Render claims that: "the term 'stereotype' only parrots back the justice principle we impose upon it. Our concept of 'stereotype' is simply too thin to do more."¹³¹ This article takes a different view. In American equal protection law, stereotyping is a broad and versatile concept. There is no one-size-fits-all answer to the question when stereotyping is invidious. What the case law shows is that it depends on the kind of stereotype (role-typing, false, prescriptive, or statistical), the ground of the stereotype (gender, race, disability, age etc) and the context in which it is deployed (e.g., employment). But that does not make the anti-stereotyping principle an empty vessel: the Supreme Court has developed several guidelines

¹²³ See, e.g., Robert Post, *Prejudicial Appearances: The Logic of American Anti-Discrimination Law*, 88 CAL. L. REV. 1 (2000); Render, *supra* note 94; DEBORAH L. RHODE, *THE BEAUTY BIAS* (2010); Kerri Lynn Stone, *Clarifying Stereotyping*, 59 U. KAN. L. REV. 591 (2011); KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* (2006).

¹²⁴ For analysis see, e.g., Render, *supra* note 94; Stone, *supra* note 123.

¹²⁵ *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). For discussion see, e.g., Susan T. Fiske et al., *Social Science Research on Trial: Use of Sex Stereotyping Research in Price Waterhouse v. Hopkins*, 46 AMERICAN PSYCHOLOGIST 1049 (1991); Stone, *supra* note 123.

¹²⁶ *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235 (1989).

¹²⁷ *Id.* at 256.

¹²⁸ *Id.*

¹²⁹ *Id.* at 251.

¹³⁰ Render, *supra* note 94, at 143.

¹³¹ *Id.* at 161.

that predict the permissibility of a stereotype. To be clear: this article does not seek to develop a normative theory about the question when stereotyping *ought* to be considered invidious.¹³² Rather, it descriptively explores what makes stereotypes invidious according to the Supreme Court.

Key to the Supreme Court's approach to stereotypes is its concern with *role-typing*. As the last section noted, this concern seems to animate all parts of the anti-stereotyping jurisprudence. What is so harmful about role-typing? Throughout recent decades, the Supreme Court has provided several angles on the wrongs of role-typing. One of these angles is autonomy: role-typing infringes on the freedom of every individual to carve their own path in life and, in doing so, prove their mettle.¹³³ This is why women should be allowed access to Virginia's Military Institute¹³⁴ and why men should be allowed access to a State-run School of Nursing.¹³⁵ The Court recognizes that role-types exercise control over people.¹³⁶ In *Frontiero*, the Court puts this powerfully: traditionally, the Court held, different roles for men and women were "rationalized by an attitude of "romantic paternalism" which, in practical effect, put women, not on a pedestal, but in a cage."¹³⁷ Another important angle on the wrongs of role-typing is subordination: by assigning different roles to men and women, women end up in an inferior "legal, social, and economic" position.¹³⁸ The Court has repeated again and again that women may not be denied rights or opportunities because they are assumed to fulfill a different role in life than men.¹³⁹

Ultimately, the Court recognizes that role-typing *creates discrimination* in subtle and self-sustaining ways. Take this powerful passage from *Hibbs* (2003), a case about a male employee who sought leave from work under the Family and Medical Leave Act:¹⁴⁰

Stereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. Because employers continued to regard the family as the woman's domain, they often denied men similar accommodations or discouraged them from

¹³² Other people have done so. In the American context, see notably DEBORAH HELLMAN, *WHEN IS DISCRIMINATION WRONG?* (2008). Hellman argues that discrimination is wrong when it is demeaning: "demeaning is the core moral concept separating permissible from impermissible differentiation." *Id.* at 30.

¹³³ Suk, *supra* note 11, at 54. See e.g., *U.S. v. Virginia*, 518 U.S. 515, 532 (1996) (Scalia J. dissenting) (women should have "equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities").

¹³⁴ *Id.*

¹³⁵ *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982).

¹³⁶ See, e.g., *Gonzales v. Carhart*, 550 U.S. 124, 185-186 (2007) (Ginsburg, J., dissenting).

¹³⁷ *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973).

¹³⁸ *U.S. v. Virginia*, 518 U.S. 515, 534 (1996).

¹³⁹ See, e.g., *id.* at 543.

¹⁴⁰ 29 U.S.C. §2612 (2006).

taking leave. These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver, and fostered employers' stereotypical views about women's commitment to work and their value as employees. Those perceptions, in turn, Congress reasoned, lead to subtle discrimination that may be difficult to detect on a case-by-case basis.¹⁴¹

In Glenn Loury's words, by acting on their stereotypes, observers (in this case employers) "set in motion a sequence of events that has the effect of reinforcing their initial judgment."¹⁴² The *Hibbs* quote shows that the Supreme Court understands this problematic circularity of stereotypes perfectly.

The Court refers to these wrongs of role-typing in cases that concern the other three sorts of stereotype: false, statistical and prescriptive. To start with *false stereotypes*: it is not surprising that, once it started on the anti-stereotyping path, the Supreme Court has had least difficulty determining that these are invidious. False stereotypes are always invidious because, in Appiah's words, "they burden people for no good reason."¹⁴³ What is distinctive about false stereotyping is that it often affixes a stigma.¹⁴⁴ The Court has on several occasions named this connection between false stereotypes and stigmatization. For example, in a case about jury selection, *J.E.B. v. Alabama* (1994), the Court held: "Striking individual jurors on the assumption that they hold particular views simply because of their gender is 'practically a brand upon them, affixed by the law, an assertion of their inferiority.' . . . It denigrates the dignity of the excluded juror".¹⁴⁵ The Court reasons that acting on an erroneous stereotype leads to the stigmatization of certain jurors, and that this in turn is an offense to their dignity.

As regards *statistical stereotypes*, the question when they are invidious is exceedingly tricky. The U.S. Supreme Court has often seemed to suggest that the State cannot rely on such a stereotype vis-à-

¹⁴¹ Nevada Department of Human Resources v. Hibbs, 538 U.S. 721, 736 (2003). For an analysis of the anti-stereotyping reasoning in this case and its significance compared to older cases, see Reva B. Siegel, "You've Come A Long Way Baby": Rehnquist's New Approach to Pregnancy Discrimination in *Hibbs*, 58 STAN. L. REV. 1871 (2005-2006).

¹⁴² LOURY, *supra* note 76, at 23.

¹⁴³ Appiah, *supra* note 96, at 48.

¹⁴⁴ See R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 830-836 (2004) for more about the ways in which stereotypes and racial stigma reinforce each other. See also LOURY, *supra* note 76, at 15-107. I do not mean to imply that stigmatization *only* occurs through false stereotyping. People are also regularly stigmatized, for example, for not conforming to prescriptive role-types.

¹⁴⁵ *J.E.B. v. Alabama*, 511 U.S. 127, 142 (1994) (citations omitted).

vis an individual who does not have the characteristic that is associated with her group.¹⁴⁶ It is tempting to assume that the Court's objection to statistical stereotypes lies in their "overbreadth", or, in other words, their lack of accuracy.¹⁴⁷ Indeed, the Court uses the term "overbroad" a lot when it refers to stereotypes.¹⁴⁸ But on further reflection, the sole fact of overbreadth does not do much analytical work.¹⁴⁹ Frederick Schauer has pointed out that rules, which are based on overbroad generalizations about classes of people, are made all the time without being struck down by anti-discrimination law.¹⁵⁰ In fact, as John Hart Ely noted, stereotypes "are the inevitable stuff of legislation."¹⁵¹ Take, for example, the rule that in order to get a driver's license one must be at least 16 years old (18 in much of Europe). This rule is based on the assumption that children who are younger than that will not be safe drivers. This assumption is, in turn, based on the stereotype that children are likely to be reckless. This is an example of a statistically sound stereotype that will without any difficulty pass the test of equal protection law.

Subsequently, only certain sorts of statistical stereotypes will be considered problematic. This is much more a matter of content than of accuracy.¹⁵² The invidiousness of statistical stereotypes largely depends on their grounds, such as disability, gender or race. U.S. equal protection law does not offer a comprehensive or unified theory in this respect: statistical *gender* stereotypes are not necessarily invidious for the same reason that statistical *disability* stereotypes may be. Again the gender equality case law provides the clearest guidance on why the Supreme Court considers some statistical stereotypes wrong: it is because today's statistical reality is often the product of past disadvantage. In other words, many statistically sound stereotypes are actually the result of cultural contingency; their soundness is a product of past discrimination and that is why the Court is suspicious of them.¹⁵³ This is

¹⁴⁶ See, e.g., *Nguyen v. INS*, 533 U.S. 53, 89 (2001) (O'Connor J. dissenting) ("contrary to this stereotype, Boulais [the father] has reared Nguyen, while Nguyen apparently has lacked a relationship with his mother.").

¹⁴⁷ This is Mary Anne Case's (descriptive) argument. ("[T] assumption at the root of the sex-respecting rule must be true either of all women or no women or all men or no men . . . overbreadth alone seems to be enough to doom a sex-respecting rule."). Case, *supra* note 94, at 1449-1450.

¹⁴⁸ See, e.g., *J.E.B. v. Alabama*, 511 U.S. 127, 131 (1994); *U.S. v. Virginia*, 518 U.S. 515, 533 and 542 (1996).

¹⁴⁹ Although on occasion the Court does remark on the closeness of the fit, or in other words the degree to which the stereotype is statistically correct. See, e.g., *Craig v. Boren*, 429 U.S. 190, 201-202 (1976) ("if maleness is to serve [as] a proxy for drinking and driving, a correlation of 2% must be considered an unduly tenuous 'fit.'").

¹⁵⁰ See Frederick Schauer's work for a convincing argument that "generalizing about classes is more prevalent, and more accepted, than is often appreciated." FREDERICK SCHAUER, *PROFILES, PROBABILITIES AND STEREOTYPES* 72 (2003). See also HELLMAN, *supra* note 132, at 114-137.

¹⁵¹ JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 156 (1980).

¹⁵² Cf. HELLMAN, *supra* note 132, at 132.

¹⁵³ SCHAUER, *supra* note 150, at 139-141 ("the cultural contingency of that empirical basis . . . makes it wrong to translate the empirical generalization into public policy."). *Id.* at 141.

where the Court's concern with role-typing often comes in again. It is statistically correct, for example, to say that women are more likely than men to be homemakers. But this is because women have historically been expected to fulfill this role and because they have been excluded from roles in the public sphere.¹⁵⁴ This is also why the Court speaks of "a self-fulfilling cycle of discrimination" in the *Hibbs* case.¹⁵⁵

What makes *prescriptive stereotypes* invidious is again a complex issue. Obviously, like statistical stereotypes, not all stereotypes that envisage a certain form of behavior by certain groups of people are wrong.¹⁵⁶ Take, for example, family law provisions that require parents to take care of their children and ensure that their basic necessities are met. These legal provisions are not a form of discrimination, even though they are based on a prescriptive stereotype, namely that parents should assume responsibility for their children. The case law is clear that prescriptive stereotypes that dictate a role division between men and women are unacceptable. However, especially in the employment context, it is unclear precisely when prescriptive role-typing is problematic.¹⁵⁷ Thus, lower courts have frequently failed to apply the Supreme Court's broad holding in *Hopkins*, that "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group",¹⁵⁸ to complaints of sexual orientation or gender identity discrimination (as these are not explicitly covered by Title VII).¹⁵⁹

D) Critiques of the American Anti-Stereotyping Doctrine

Domestic scholars have extensively criticized the Supreme Court's usage of the anti-stereotyping principle. This article will not be able to do justice to all these critiques. Some of the most pressing issues require mention, however, in order to caution the ECtHR against the pitfalls of the stereotype concept.

First of all, some judges¹⁶⁰ and many scholars¹⁶¹ have complained about the opacity of the concept. Much of the confusion stems from the fact that the Supreme Court often conflates the

¹⁵⁴ See *e.g.*, *Stanton v. Stanton* 421 U.S. 7, 15 (1975).

¹⁵⁵ See *supra* text accompanying note 141.

¹⁵⁶ See also Appiah, *supra* note 96, at 49. Appiah seems to disagree, however, about statistical stereotypes. He considers these per definition wrong because they involve an "intellectual error", namely a misunderstanding of the relevance of the facts.

¹⁵⁷ See generally Render, *supra* note 94; Stone, *supra* note 123.

¹⁵⁸ *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989).

¹⁵⁹ For discussion see, *e.g.*, Kramer, *supra* note 95; Jason Lee, *Lost in Transition: The Challenges of Remediating Transgender Employment Discrimination Under Title VII*, 35 HARV. J.L. & GENDER 423 (2012).

¹⁶⁰ *J.E.B. v. Alabama*, 511 U.S. 127, 161 (1994) (Scalia J., dissenting).

meaning of the term stereotype with the *harms* associated with the concept. Thus, the Supreme Court regularly uses the term “stereotype” pejoratively, namely as meaning an *unfair* generalization.¹⁶² The next part will show that the Canadian Supreme Court creates a similar confusion.¹⁶³ The ECtHR ought to avoid such misunderstandings and stay closer to a neutral definition: as beliefs about groups of people, stereotypes are not necessarily unfair or negative. Stereotypes first need to be named and then their harms need to be assessed in context.¹⁶⁴

Another important critique is that the Supreme Court has been unreceptive to the ways in which stereotyping might be justified when it is done to ameliorate the position of a disadvantaged group. In *Regents of the University of California v. Bakke*, the well-known case concerning affirmative action in higher education, Justice Powell (writing for the majority) observed that “preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth.”¹⁶⁵ This is turning the argument around: on this account, affirmative action can hardly be justified, because it would create further stereotypes. The suspicious attitude of the Supreme Court towards ameliorative measures is possibly partly due to a deep-seated cultural emphasis on liberty. But it also has specific jurisprudential roots in the 1970s, when, in (in)famous cases such as *Geduldig v. Aiello* (1974) and *General Electric Company v. Gilbert* (1975),¹⁶⁶ the Supreme Court “declined to apply the anti-stereotyping principle in domains where it had identified “real” differences between the sexes”, such as pregnancy and abortion.¹⁶⁷ When a distinction was made on the grounds of “real”, physical, difference, the Court did not see the generalization at issue as a stereotype. To be sure, since then, in cases like *VMI* the Supreme Court has recognized that “[i]n limited circumstances, a gender-based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened.”¹⁶⁸ Still, however, the Court does not see room for the compensatory use of stereotypes

¹⁶¹ See, e.g., Render, *supra* note 94; Stone, *supra* note 123.

¹⁶² See, e.g., Nguyen v. INS, 533 U.S. 53, 68 and 90 (2001).

¹⁶³ See *infra* Part IV.B.

¹⁶⁴ See also *infra* Part V.A.

¹⁶⁵ 438 U.S. 265 at 298 (1978).

¹⁶⁶ *Geduldig v. Aiello*, 417 U.S. 484 (1974); *General Electric Company v. Gilbert*, 429 U.S. 125 (1975).

¹⁶⁷ Franklin, *supra* note 2, at 90. For a critique of the ways in which the Court deals with stereotypes in cases that concern reproduction, see also, e.g., Gans, *supra* note 90; Neil S. Siegel & Reva B. Siegel, *Pregnancy and Sex Role Stereotyping: From Struck to Carhart*, 70 OHIO STATE L. J. 1095 (2009); Barbara Stark, *Anti-stereotyping and “The End of Men”*, 92 B.U.L. REV. ANNEX 1(2012).

¹⁶⁸ *U.S. v. Virginia*, 518 U.S. 515, 533-534 (1996) (citations omitted). See also *Mississippi University for Women v. Hogan*, 458 U.S. 718, 728 (1982) (“[i]n limited circumstances, a gender-based classification favoring one sex can be

when they concern physical differences. Mandatory retirement for employees who have reached a certain age, for example, is not an option,¹⁶⁹ and neither is mandatory maternity leave.¹⁷⁰ The Supreme Court continues to look askance at protective measures. Julie Suk has argued that this has significantly inhibited the Court's ability to achieve substantive equality. She writes: "The American antistereotyping approach attempts to give women the same chance as men to prove their mettle, but fails miserably by ignoring the gendered barriers to their ability to do so."¹⁷¹ Part V.A will continue the issue of protective stereotyping, as this is a topic on which the American, Canadian and Strasbourg jurisprudence widely diverge.

IV. Stereotype as a Concept in Canadian Charter Equal Protection Law

A) Introduction: Historical Development of the Stereotype Concept

The concept of stereotyping has gained great prominence in Canadian equality jurisprudence, but it is difficult to retrace its precise origins. Very likely, the concept is partly a doctrinal transplant or a "migrant idea" from the U.S.,¹⁷² where, as was just discussed, the concept has a long pedigree.¹⁷³ The first time the Supreme Court of Canada referred to stereotyping as a problem of discrimination was in the case of *C.N.R. v. Canada (Human Rights Commission)* (1987).¹⁷⁴ This case, concerning the disadvantaged position of women in the hiring policies of the Canadian National Railway Co., was litigated under the Canadian Human Rights Act.¹⁷⁵ Next, the concept was present in the very first Supreme Court case litigated under s.15 of the Canadian Charter of Rights and Freedoms ("the

justified if it intentionally and directly assists members of the sex that is disproportionately burdened."); Case, *supra* note 94, at 1460-1461.

¹⁶⁹ Suk, *supra* note 15.

¹⁷⁰ Suk, *supra* note 11.

¹⁷¹ *Id.* at 54.

¹⁷² This term is borrowed from *THE MIGRATION OF CONSTITUTIONAL IDEAS* (Sujit Choudry ed., 2006).

¹⁷³ The US 14th amendment and its jurisprudence has generally had a profound impact on the development of the Canadian constitutional equality guarantee, though largely as an anti-model. See, e.g., Mayo Moran, *Protesting Too Much: Rational Basis Review under Canada's Equality Guarantee*, in: *DIMINISHING RETURNS: INEQUALITY AND THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS* 71 (Sheila McIntyre & Sanda Rodgers eds., 2006).

¹⁷⁴ *C.N.R. v. Canada (Human Rights Commission)*, [1987] 1 S.C.R. 1114 (Can.). Regrettably, there is no Canadian equivalent of the kind of history Cary Franklin has written about the U.S. anti-stereotyping principle. See Franklin, *supra* note 2.

¹⁷⁵ R.S.C. 1985, c. H-6.

Charter”),¹⁷⁶ namely *Andrews v. Law Society* (1989).¹⁷⁷ *Andrews* raised the question whether the rule that Canadian citizenship was required for admittance to the bar of British Columbia violated s.15. The majority of the Supreme Court ruled that it did. Though the Court used the term stereotype only fleetingly in *Andrews*, the essence of the idea was there.¹⁷⁸ Later came *Law v. Canada* (1999), a case that concerned the question whether in granting survivor’s benefits the Canadian Pension Plan could set a threshold age of 35, or whether this constituted age discrimination.¹⁷⁹ The judgment in this case defined the frame in which the Supreme Court would interpret s.15 during the next decade. The Court held: “The purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice.”¹⁸⁰

In *R. v. Kapp* (2008), the Court built on *Law* and formulated “a two-part test for showing discrimination under s. 15(1)”, namely “1) Does the law create a distinction based on an enumerated or analogous ground?; 2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?”¹⁸¹ The applicants in *Kapp*, who were commercial fishers, complained that an exclusive 24-hour fishing license that was given to three aboriginal bands constituted race discrimination. The Supreme Court disagreed and concluded that the measure, which was aimed at ameliorating the position of the aboriginal bands, did not breach s.15.

The *Kapp* test is the current test under s.15.¹⁸² It shows that the concept of stereotyping is crucial to the Supreme Court’s understanding of discrimination, as stereotyping is one of just two ways (the other being the perpetuation of prejudice) in which a distinction can be held discriminatory under the Canadian Charter.¹⁸³ Indeed, several authors have held the view that stereotyping is *too* dominant as a concept in s.15 jurisprudence, in the sense that the emphasis on stereotyping has impeded the Court from recognizing forms of discrimination that cannot be captured by this

¹⁷⁶ Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K). Section 15 states:

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

¹⁷⁷ *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 (Can.).

¹⁷⁸ *Id.* at ¶ 43.

¹⁷⁹ *Law v. Canada*, [1999] 1 S.C.R. 497 (Can.).

¹⁸⁰ *Id.* ¶ at 51.

¹⁸¹ *R. v. Kapp*, [2008] 2 S.C.R. 483, ¶ 17 (Can.)

¹⁸² Recently confirmed in *Quebec (Attorney General) v. A.*, [2013] S.C.C. 5, ¶ 185 (Can.).

¹⁸³ *Id.* ¶ at 185-206.

heuristic.¹⁸⁴ The critics make a valid point: many s.15 claims have stranded because the claimant could not prove that a rule was based on a stereotype.¹⁸⁵ The Supreme Court acknowledged this critique in *Quebec (Attorney General) v. A.* (2013), which concerns the question whether it is valid to exclude *de facto* spouses from the patrimonial and support rights granted to married and civil union spouses.¹⁸⁶ This judgment reveals that while the concept of stereotyping is undoubtedly crucial in s.15 jurisprudence, it is also still being further developed.

The next sections will analyze how the Supreme Court of Canada conceptualizes stereotyping and its wrongs. The focus is on the Court's interpretation of the Charter, which is part of the Canadian Constitution. In Canada, each province also has separate anti-discrimination legislation (such as, for example, the Ontario Human Rights Code), but as space is limited this article will not discuss the Supreme Court's interpretation of that type of legislation. These provincial laws concern discrimination in horizontal relations and that makes them less directly relevant for a comparison with the case law of the ECtHR.¹⁸⁷ Neither will this article discuss criminal law jurisprudence, where the issue of stereotyping also has come up occasionally.¹⁸⁸ The exceptional criminal law case that will be discussed, *R. v. Ewanchuk*, is a case that also raised an s.15 claim.¹⁸⁹

B) How Does the Canadian Supreme Court Conceive of Stereotypes?

Given the centrality of the concept of stereotyping, especially since *R. v. Kapp*, the Canadian Supreme Court has made surprisingly little effort to explicate its understanding of stereotypes.¹⁹⁰ Nor has it made

¹⁸⁴ See, e.g., Gwen Brodsky & Shelagh Day, *Women's Poverty is an Equality Violation*, in MAKING EQUALITY RIGHTS REAL, MAKING EQUALITY RIGHTS REAL: SECURING SUBSTANTIVE EQUALITY UNDER THE CHARTER 319, 324-329 (Fay Faraday, Margaret Denike & M. Kate Stephenson eds., 2009); Sophia Moreau, *The Promise of Law v. Canada*, 57 U. TORONTO L. J. 415, 420-421 (2007).

¹⁸⁵ See, e.g., *Lovelace v. Ontario*, [2000] 1 S.C.R. 950, ¶ 73 (Can.); *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] 2 SCR 567, ¶ 108 (Can.); *Withler v. Canada*, [2011] 1 S.C.R. 396, ¶ 77 (Can.); *Gosselin v. Quebec*, [2002] 4 S.C.R. 429, ¶ 70 (Can.) (LeBel, J. dissenting).

¹⁸⁶ *Quebec (Attorney General) v. A.*, [2013] S.C.C. 5, ¶ 205 (Can) ("The Court has thus explicitly acknowledged the inadequacy of a uniquely stereotype-based approach that has been criticized by several authors.").

¹⁸⁷ Although a horizontal case of employment discrimination can end up at the ECtHR if the domestic courts did not address the issue properly due to a shortcoming in national law. See, e.g., *Redfearn v. United Kingdom*, App. No. 47335/06, 6 November 2012.

¹⁸⁸ See, e.g., *R. v. Seaboyer*, [1991] 2 S.C.R. 577, ¶ 129 et seq. (Can.) (L'Heureux-Dubé J. dissenting in part); *R. v. Cinous*, [2002] 2 S.C.R. 3, ¶ 167 (Can.) (Arbour J. dissenting).

¹⁸⁹ *R. v. Ewanchuk*, [1999] 1 S.C.R. 330 (Can.). See *infra* Part IV.B.

¹⁹⁰ Many commentators have delivered the same critique. See, e.g., Denise Réaume, *Defending the Human Rights Codes from the Charter*, 9 J.L. & EQUALITY 67, par. 35-36 (2012).

any real effort to explain how it understands the difference between prejudice and stereotypes, while a distinction between these two concepts is clearly made in the second part of the *Kapp*-test.¹⁹¹

Similar to the U.S. Supreme Court, the Canadian Supreme Court blends its definition of stereotyping with the question when stereotyping is invidious. The Court namely reasons that the requirement of substantive equality is violated when stereotyping occurs.¹⁹² The Court reflexively talks about stereotyping and discrimination together. Oversimplified, the Court seems to say: stereotyping = invidious = discrimination.

Trying to disentangle that reasoning, one finds the clearest definition of stereotypes in the *Law* case. In *Law* the Court observes: “A stereotype may be described as a misconception whereby a person or, more often, a group is unfairly portrayed as possessing undesirable traits, or traits which the group, or at least some of its members, do not possess.”¹⁹³ This definition actually holds three forms of stereotype:

- 1) Negative stereotypes (a belief that a group possesses “undesirable traits”);
- 2) Statistically unsound stereotypes (a belief that a group possesses traits which, in fact, it does not possess); and
- 3) Statistically sound stereotypes that are incorrect for the individual applicant (a statistically sound but overbroad belief about the traits of certain groups).¹⁹⁴

These three kinds of stereotype are indeed found throughout the s.15 case law. The Court does not often uncover explicitly negative stereotypes, but there are some examples. In *Vriend v. Alberta*, for instance, a case that concerned a man whose employment was terminated on the basis of his homosexuality, the Court condemned “the stereotype that homosexuals are less deserving of protection and therefore less worthy of value as human beings.”¹⁹⁵ The majority of stereotypes in the jurisprudence concern the second and third varieties, however. Most of the time, though, the Court does not determine whether a stereotype is actually statistically sound or not, but just confines itself to saying

¹⁹¹ See *supra* text accompanying note 181 about the *Kapp*-test.

¹⁹² See, e.g., *Withler v. Canada*, [2011] 1 S.C.R. 396, ¶ 39 (Can.).

¹⁹³ *Law v. Canada*, [1999] 1 S.C.R. 497, ¶ 64 (Can.).

¹⁹⁴ Again, of course a stereotype can be both negative and either statistically sound or unsound.

¹⁹⁵ *Vriend v. Alberta*, [1998] 1 S.C.R. 493, ¶ 30 (Can.). Other examples of negative stereotypes include: *Lovelace v. Ontario*, [2000] 1 S.C.R. 950, ¶ 71 (Can.) (“by the stereotype that they are “less aboriginal”, with the result that they are generally treated as being less worthy of recognition, and viewed as being disorganized and less accountable than other aboriginal peoples”); *R. v. Williams*, [1998] 1 S.C.R. 1128, ¶ 58 (Can.) (1998) (“Put at its baldest, there is an equation of being drunk, Indian and in prison. Like many stereotypes, this one has a dark underside. It reflects a view of native people as uncivilized and without a coherent social or moral order. The stereotype prevents us from seeing native people as equals.”) (citations committed).

that the belief in question “does not correspond to the actual circumstances and characteristics of the claimant or claimant group.”¹⁹⁶ Thus, the Court commonly talks of stereotypes as “attributed rather than actual characteristics.”¹⁹⁷

The Court’s understanding of stereotypes as inaccurate characterizations runs up against the fact that laws are inevitably based on generalizations.¹⁹⁸ In practice, therefore, the Court has tolerated many inaccurate/overbroad stereotypes. The prime examples are the Court’s numerous judgments that concern age-based restrictions in benefit schemes.¹⁹⁹ Take, for instance, *Gosselin v. Quebec*, a case concerning a Quebec social assistance scheme that set the rate for adults under 30 at one-third the rate for those over 30.²⁰⁰ McLachlin C.J., writing for the majority, held: “The legislator is entitled to proceed on informed general assumptions without running afoul of s. 15, . . . provided these assumptions are not based on arbitrary and demeaning stereotypes.”²⁰¹ Turning to the facts of the case at hand, however, and to the argument that the selection of the age of 30 as a cut-off point failed to correspond to the actual situation of young adults requiring social assistance, she held: “[A]ll age-based legislative distinctions have an element of this literal kind of ‘arbitrariness’. That does not invalidate them.”²⁰² In one breath, the Chief Justice says that rules may not be based on arbitrary stereotypes, yet that some measure of arbitrariness is inevitable in age-based restrictions. Denise Réaume points out that: “[t]he degree of inaccuracy, it seems, must pass some unspoken threshold before it counts as a stereotype.”²⁰³

What lacks in the Canadian jurisprudence are *role-typing stereotypes* and *prescriptive stereotypes*. Compared to the U.S., the Canadian Supreme Court does not have a strong judicial discourse about role-typing and prescriptive stereotyping. One notable exception is Justice L’Heureux-Dubé’s separate opinion in the case of *R. v. Ewanchuk* (1999).²⁰⁴ *Ewanchuk* was not litigated under s.15, but as a criminal law case. The complainant was sexually assaulted as a 17-year-old girl by the much older Ewanchuk in his van. At issue was whether the trial judge had erred in thinking that the

¹⁹⁶ Withler v. Canada, [2011] 1 S.C.R. 396, ¶ 36 (Can.).

¹⁹⁷ See, e.g., *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, ¶ 37 (Can.); *Miron v. Trudel*, [1995] 2 S.C.R. 418, ¶ 132 (Can.) (McLachlin J.) (“presumed rather than actual characteristics”); *Gosselin v. Quebec*, [2002] 4 S.C.R. 429, ¶ 38 (Can.) (LeBel, J. dissenting); *R. v. Kapp*, [2008] 2 S.C.R. 483, ¶ 18 (Can.).

¹⁹⁸ See *supra* text accompanying notes 149-152.

¹⁹⁹ See, e.g., *Law v. Canada*, [1999] 1 S.C.R. 497 (Can.); *Gosselin v. Quebec*, [2002] 4 S.C.R. 429 (Can.); *Withler v. Canada*, [2011] 1 S.C.R. 396 (Can.).

²⁰⁰ *Gosselin v. Quebec*, [2002] 4 S.C.R. 429 (Can.).

²⁰¹ *Id.* at ¶ 56.

²⁰² *Id.* at ¶ 57.

²⁰³ Réaume, *supra* note 190, at par. 35.

²⁰⁴ *R. v. Ewanchuk*, [1999] 1 S.C.R. 330 (Can.).

defense of “implied consent” existed in Canadian law. Justice L’Heureux-Dubé chose to recast the essence of the case as follows: “This case is not about consent, since none was given. It is about myths and stereotypes.”²⁰⁵ According to her, both the trial judge and the Court of Appeal judge relied on “mythical assumptions that when a woman says ‘no’ she is really saying ‘yes’, ‘try again’, or ‘persuade me.’”²⁰⁶ Furthermore, in response to the Court of Appeal judge’s suggestion that the applicant could have dealt better with the assault by using “a well-chosen expletive, a slap in the face or, if necessary, a well-directed knee”, Justice L’Heureux-Dubé also condemned the prescriptive stereotype that “women should use physical force, not resort to courts to ‘deal with’ sexual assaults.”²⁰⁷ Justice L’Heureux-Dubé’s opinion skillfully uncovers simultaneously the essence of this particular case and its wider implications for women’s equality.

C) When Does the Canadian Supreme Court Consider Stereotypes Invidious?

The Canadian s.15 jurisprudence is much richer on the topic of how discriminatory distinctions can be distinguished from non-discriminatory ones than it is on the topic of how to conceptualize stereotypes. Ever since *Andrews*, the Canadian Supreme Court has expressed its commitment to substantive or “true” equality (as opposed to formal equality).²⁰⁸ The Court couples substantive equality to a contextual approach: whether discrimination exists depends on context.²⁰⁹ According to the Court, “the main consideration must be the impact of the law on the individual or the group concerned.”²¹⁰ Thus “the analysis involves looking at the circumstances of members of the group and the negative impact of the law on them. The analysis is contextual, not formalistic, grounded in the actual situation of the group and the potential of the impugned law to worsen their situation.”²¹¹

However, the Court’s thinking has evolved noticeably over the years on the question of how impact is to be assessed. In *Law v. Canada*, the Court famously “turned towards dignity” to distinguish

²⁰⁵ *Id.* at ¶ at 82 (L’Heureux-Dubé, J., dissenting). See for further analysis of Judge L’Heureux-Dubé’s opinion from the perspective of stereotyping: COOK & CUSACK, *supra* note 13.

²⁰⁶ *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, ¶ 87 (Can.) (L’Heureux-Dubé, J., dissenting).

²⁰⁷ *Id.* at ¶ 93.

²⁰⁸ *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, ¶ 25-34 (Can.). See for discussion Moran, *supra* note 173.

²⁰⁹ See, e.g., *Ermineskin Indian Band and Nation v. Canada*, 2009 SCC 9, ¶ 193 (2009); *Withler v. Canada*, [2011] 1 S.C.R. 396, ¶ 37 (Can.).

²¹⁰ *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, ¶ 26 (Can.).

²¹¹ *Withler v. Canada*, [2011] 1 S.C.R. 396, ¶ 37 (Can.).

permissible from impermissible distinctions:²¹² differential treatment is discriminatory, the Court held, when it demeans a person's dignity. In order to assess whether a person's dignity is demeaned, the Court proposed four contextual factors in *Law*:

- 1) pre-existing disadvantage, vulnerability, stereotyping, or prejudice experienced by the individual or claimant group;
- 2) degree of correspondence between the "ground on which the claim is based and the actual need, capacity or circumstances of the applicant",²¹³
- 3) whether the law or program has an ameliorative purpose or effect; and
- 4) the nature of the interest affected.²¹⁴

Although the dignity test received a lot of criticism from academic circles – which the Court explicitly acknowledged in *R. v. Kapp*²¹⁵ – the four *Law* factors have been used ever since.

In *Kapp*, the Court proposed to interpret these four contextual factors as going to the question of whether the claimant suffered disadvantage or stereotyping, "rather than to the *Law* question of whether the claimant's dignity has been demeaned."²¹⁶ This is what the Court says:

The four factors cited in *Law* are based on and relate to the identification in *Andrews* of perpetuation of disadvantage and stereotyping as the primary indicators of discrimination. Pre-existing disadvantage and the nature of the interest affected (factors one and four in *Law*) go to perpetuation of disadvantage and prejudice, while the second factor deals with stereotyping. The ameliorative purpose or effect of a law or program (the third factor in *Law*) goes to whether the purpose is remedial within the meaning of s. 15(2).²¹⁷

²¹² Cf. Fay Faraday, Margaret Denike & M. Kate Stephenson, *In Pursuit of Substantive Equality*, in MAKING EQUALITY RIGHTS REAL, *supra* note 184, at 9, 15 (ascribing the phrase to Denise Réaume). See generally about the Canadian Supreme Court's turn to dignity Denise G. Réaume, *Discrimination and Dignity*, 63 LOUISIANA L. REV. 1 (2003).

²¹³ Faraday, Denike & Stephenson, *supra* note 184, at 15.

²¹⁴ *Law v. Canada*, [1999] 1 S.C.R. 497, ¶ 72-75 (Can.).

²¹⁵ *R. v. Kapp*, [2008] 2 S.C.R. 483, ¶ 22 (Can.).

²¹⁶ Sophia Moreau, *R. v. Kapp: New Directions for Section 15*, 40 OTTAWA L. REV. 283, par. 16 (2008-2009).

²¹⁷ *R. v. Kapp*, [2008] 2 S.C.R. 483, ¶ 23 (Can.).

So, according to the Supreme Court, the correspondence factor²¹⁸ (factor number two) deals with stereotyping.²¹⁹ The Court confirmed this in *Withler* (2011), a case concerning widows whose federal supplementary death benefits were reduced because of the age of their husbands at the time of death: “Where the claim is that a law is based on stereotyped views of the claimant group, the issue will be whether there is correspondence with the claimants' actual characteristics or circumstances.”²²⁰ If there is no such correspondence, the Court considers the stereotype invidious.

The third factor – whether the law or program has an ameliorative purpose or effect – is also interesting in the context of the topic of this article. A significant part of the Supreme Court’s s.15 equality jurisprudence concerns ameliorative measures. The Canadian Charter explicitly allows for affirmative action, in s.15(2).²²¹ The relationship between s.15(1) and s.15(2) is intensively debated both by the Court itself²²² and by academic commentators.²²³ In *R. v. Kapp*, the Court held that s.15(1) is aimed at *preventing* discrimination and that s.15(2) is aimed at *enabling* governments to proactively combat discrimination.²²⁴ If the Government can demonstrate that a measure meets the criteria of s.15(2) then this measure is insulated from challenges under s.15(1).²²⁵

Remarkably, the Court’s approach to stereotypes under s.15(2) is very different from its approach under s.15(1): when a stereotype is deployed for a “good” purpose, the requirement of “fit” (which is of such paramount importance under s.15(1)) is interpreted leniently.²²⁶ This can be deduced from several of the Court’s remarks in the *Kapp* case, notably that “[n]ot all members of the group need to be disadvantaged, as long as the group as a whole has experienced discrimination”²²⁷ and “[t]he fact that some individual members of the bands may not experience personal disadvantage does not negate the group disadvantage suffered by band members.”²²⁸ Ameliorative measures can suffer from both

²¹⁸ *R. v. Kapp* defines this factor as the “degree of correspondence between the differential treatment and the claimant group's reality.” *Id.* at ¶ 19 (summarizing the *Law* case).

²¹⁹ See also *Quebec (Attorney General) v. A.*, [2013] S.C.C. 5, ¶ 203 and 206 (Can.).

²²⁰ *Withler v. Canada*, [2011] 1 S.C.R. 396, ¶ 38 (Can.).

²²¹ See *supra* note 176.

²²² *R. v. Kapp*, [2008] 2 S.C.R. 483 (Can.).

²²³ See, e.g., Vanita Goela, *A Proposed Transjudicial Approach to s. 15(2) Charter Adjudication*, 32 THE DALHOUSIE LAW JOURNAL 109 (2009); Luc B. Tremblay, *Promoting Equality and Combating Discrimination Through Affirmative Action: The Same Challenge? Questioning the Canadian Substantive Equality Paradigm*, 60 AM. J. COMP. L. 181 (2012).

²²⁴ *R. v. Kapp*, [2008] 2 S.C.R. 483, ¶ 37 (Can.).

²²⁵ *Id.* at ¶ 37-41; see also Moreau, *supra* note 216.

²²⁶ Some small degree of fit is still required, however: see *R. v. Kapp*, [2008] 2 S.C.R. 483, ¶ 60 (Can.).

²²⁷ *Id.* at ¶ 55.

²²⁸ *Id.* at ¶ 59.

over- and under-inclusiveness,²²⁹ but this does not seem to be of much concern to the Court. If the authorities employ a statistical stereotype for benign purposes, the Court will be extremely lenient. Perhaps not surprisingly, this confirms that the Canadian Supreme Court's approach to benign/good stereotyping is the opposite of the U.S. Supreme Court's approach. It is, in fact, much more in line with the ECtHR's views on stereotypes that serve a benevolent purpose.²³⁰

D) Critiques of the Canadian Anti-Stereotyping Doctrine

There are several issues regarding the Canadian jurisprudence that are particularly relevant in the ECtHR context. To start there are three problems with the Canadian legal reasoning that the ECtHR should take care not to replicate. In the first place, the definition of stereotypes from the *Law* judgment is misconceived.²³¹ In *Law* the Supreme Court refers to stereotypes as "misconceptions", but stereotypes are not necessarily misconceptions. Stereotypes can be statistically accurate or prescriptive (as the U.S. case law acknowledges) and, moreover, to a certain extent stereotypes can fulfill useful functions in human interaction (as psychologists have established).²³² In other words, the Supreme Court unduly narrows the concept.

The second problem is that by associating stereotyping exclusively with the second of the four *Law*-factors, namely the correspondence factor, the Supreme Court in effect reduces the inquiry into stereotypes into a question of accuracy or *fit*. This does not work well because it takes more to determine whether a stereotype is invidious, as the work of John Hart Ely, Frederick Schauer, and others – as well as the U.S. experience with statistical stereotypes – has shown.²³³ The Strasbourg Court can, however, rather easily avoid this mistake by using all four *Law*-factors to determine whether the application of a stereotype is harmful in a given situation, not just the second factor of fit. Part V will elaborate on this suggestion.

The third concern is related to this. The issue is that, since *Law*, the Supreme Court's equality analysis has become very formal and abstracted from the individual claimant. This is because the

²²⁹ Goela, *supra* note 223, at 124-129.

²³⁰ See *supra* Part II.C and *infra* Part V.A.

²³¹ See *supra* text accompanying note 193.

²³² See *supra* text accompanying notes 7-9.

²³³ See *supra* Part III.C.

correspondence factor has become the dominant one in the Court's reasoning,²³⁴ at the expense of the other contextual factors such as pre-existing disadvantage.²³⁵ The emphasis on the second *Law*-factor, so the argument runs, directs the Supreme Court's s.15 analysis to the "reasonableness of government policy choices" instead of to the effects of the impugned action on disadvantaged groups.²³⁶ In other words, the claimants disappear from the picture and in their place the Court puts policy analysis.²³⁷ Thus, in *Gosselin* the majority but slightly remarks on the extreme stress and hardship that Louise Gosselin had to endure because she did not qualify for social assistance and was destitute. The majority does not mention the fact that she tried to commit suicide or that she had been forced to exchange sex for food and shelter, in order to survive.²³⁸ Rather, the majority elaborates on the Government's purpose in enacting the benefits scheme that restricted assistance to adults over 30 and remarks that the legislator is entitled to enact laws on the basis of "everyday experience and common sense".²³⁹ Largely ignoring the perspective of the claimant, the Court takes the perspective of the legislator and assesses whether that is reasonable.²⁴⁰ The ECtHR can avoid this problem by carrying out a careful proportionality analysis that takes both the applicant's and the state's perspective into account.

Finally, it appears that the Canadian Supreme Court has difficulty recognizing stereotypes, especially when they are "imposed for the claimant's 'own good.'"²⁴¹ Margot Young has suggested that the judiciary cannot be trusted to smoke out stereotypes. Where "systemic discrimination is the norm", she writes, "it is hard to pick out stereotyping as false."²⁴² The Supreme Court may especially have a hard time recognizing harmful stereotypes when these relate to situations that are far removed from the privileged world of the judges themselves.²⁴³ Young's point is well taken.²⁴⁴ Especially when

²³⁴ For an empirical overview of how the Court has analyzed the four *Law* factors, see Bruce Ryder, Cidalia Faria & Emily Lawrence, *What's Law Good For? An Empirical Overview of Charter Equality Rights Decisions*, 24 SUPREME COURT LAW REVIEW 103, 121-122 (2004).

²³⁵ The Court itself acknowledged this criticism in *Quebec (Attorney General) v. A.*, [2013] S.C.C. 5, ¶ 206 (Can.).

²³⁶ Sheila McIntyre, *Deference and Dominance: Equality without Substance*, in: DIMINISHING RETURNS 95, at 96.

²³⁷ I thank David Schneiderman for drawing my attention to this problem.

²³⁸ *Women's Court of Canada, Gosselin v. Québec (Attorney General)*, 18 CAN. J. WOMEN & L. 193, 197 and 212 (2006).

²³⁹ *Gosselin v. Québec*, [2002] 4 S.C.R. 429, ¶ 56 (Can.).

²⁴⁰ McIntyre, *supra* note 236, at 95. This is a familiar problem of anti-discrimination law, which Alan Freeman diagnosed as far back as 1978. See Alan David Freeman, *Legitimizing Racial Discrimination through Antidiscrimination Law: A Critical Overview of the Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978).

²⁴¹ Brodsky & Day, *supra* note 184, at 327.

²⁴² Young, *supra* note 11, at 207. See similarly McIntyre, *supra* note 236, at 104-105.

²⁴³ *Id.* See also David Schneiderman, *Universality vs. Particularity: Litigating Middle Class Values under Section 15*, 33 SUPREME COURT LAW REVIEW 367 (2006).

²⁴⁴ See also Timmer, *supra* note 13, at 720.

stereotypes are so deeply entrenched that they seem like “common sense”, they are difficult to detect by judges. This is a challenge that, inevitably, the ECtHR faces as well. The Canadian experience should put the ECtHR on its guard against too easily accepting stereotypes that accord with the judges’ own preconceptions and views of the world.

V. What Strasbourg Can Borrow From the Other Side of the Atlantic

This part will highlight the positive lessons from both the American and Canadian jurisprudence and on this basis make recommendations for the ECtHR.

A) Preliminary Note on How the Tensions between U.S. and Canadian Equal Protection Doctrine Impact the Strasbourg Borrowing

There are deep tensions between American and Canadian equal protection law.²⁴⁵ Indeed, in the Canadian legal imagination U.S. equal protection law has repeatedly figured as an “anti-model”.²⁴⁶ The Canadian concept of equality is often held to be “substantive”, whereas American equality is regularly characterized as “formal.”²⁴⁷ In this article one element of difference between these two equal protection doctrines has surfaced in particular, namely that the Supreme Court of Canada is much more tolerant of protective measures and positive discrimination than the U.S. Supreme Court. Which raises the question how that affects the suggested borrowing: can the Strasbourg Court productively borrow from two such widely different equal protection doctrines?

On a methodological level it bears emphasizing that it is not the purpose of this article to reconcile these tensions. Rather, the aim is to select the features of both the American and the Canadian approaches to stereotyping that are most likely to benefit the equality analysis of the Strasbourg Court.²⁴⁸ As was explained in the Introduction, this article takes the position that the Strasbourg Court

²⁴⁵ These tensions have been extensively discussed in the scholarly literature. See, e.g., Roozbeh (Rudy) B. Baker, *Balancing Competing Priorities: Affirmative Action in the U.S. and Canada*, 18 TRANSNATIONAL LAW & CONTEMPORARY PROBLEMS 527 (2009); Moran, *supra* note 173; and Stephen F. Ross, *Symposium: 20 Years Under the Carter: Charter Insight for American Equality Jurisprudence*, 21 WINDSOR Y.B. ACCESS JUST. 227 (2002).

²⁴⁶ Moran, *supra* note 173, at 71.

²⁴⁷ See, e.g., *id.*

²⁴⁸ In comparative legal scholarship this is sometimes referred to as *bricolage*: borrowing from materials and concepts that are readily “at hand”. Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.

should develop a more transformative equality analysis, meaning that it should name, contest and seek to transform the root-causes of inequality and discrimination. It is submitted that the Strasbourg Court can borrow from both Supreme Courts without conceptual inconsistency if it takes care to appropriate only those elements of their legal reasoning that have transformative potential. What follows from the analyses of Parts III and IV is that – despite their weaknesses – both the American and Canadian case law contain seeds of a transformative approach to stereotypes. The U.S. Supreme Court is especially strong in naming the different forms of stereotyping (with a special emphasis on role-types), and in uncovering the invidious circular connection between discrimination and stereotypes. The Canadian Supreme Court, on the other hand, has richly elaborated on the elements of a contextual analysis. The next sections will discuss how the Strasbourg Court can benefit from these insights.²⁴⁹

Returning to the question how the differences between U.S. and Canadian equal protection doctrine impact the borrowing, it should be noted that as a result of these differences the Canadian Supreme Court is more likely than its American counterpart to approve of stereotyping that forms the basis for ameliorative measures. This means that where the two Supreme Courts diverge, is in their *assessment of the invidiousness* of stereotypes. The American Supreme Court is inclined to consider protective stereotyping invidious, whereas in the Canadian jurisprudence it depends on the impact of such stereotyping. The question in Canada then becomes whether the impugned stereotyping actually disadvantages a vulnerable or protected group.

The difficulty lies in the fact that when stereotyping occurs to improve the position of a disadvantaged group, the invidiousness of such stereotyping is usually ambiguous. *Andrle v. Czech Republic* (2011) forms a good illustration of this ambiguity.²⁵⁰ This case concerned the Czech pension scheme, which assigns different pensionable ages for men and women. In the Czech Republic, women with children are entitled to an earlier retirement than men, depending on the number of children they have raised. The scheme leaves no room for individual assessments: even when, in a concrete case, it was the father who took care of the family he will not be entitled to an earlier pension. The Czech Government argued that this rule was created under the former Communist regime, when women were expected to work full-time *and* to be responsible for the household, thus carrying a heavy burden.²⁵¹ The Government claimed that: “the differentiated pensionable age for women depending on the number of

J. 1225, 1286 (1998-1999). See also Bruno de Witte, *New Institutions for Promoting Equality in Europe: Legal Transfers, National Bricolage and European Governance*, 60 AM. J. COMP. L. 49 (2012).

²⁴⁹ See *infra* Part V.B—V.D.

²⁵⁰ *Andrle v. Czech Republic*, App. No. 6268/08, 17 February 2011.

²⁵¹ *Id.* at ¶ 35.

children raised would continue to be justified until social conditions changed enough for women to cease to be disadvantaged as a consequence of the existing family model.”²⁵² The ECtHR agreed with the Government and did not invalidate the pension rule under the prohibition of discrimination, because:

“changes in perceptions of the roles of the sexes are by their nature gradual . . . the State cannot be criticised for progressively modifying its pension system to reflect these gradual changes . . . and for not having pushed for complete equalisation at a faster pace . . . the Court finds that the original aim of the differentiated pensionable ages based on the number of children women raised was to compensate for the factual inequality between men and women . . . this approach continues to be reasonably and objectively justified on this ground until social and economic changes remove the need for special treatment for women.”²⁵³

Obviously, the stereotype at issue in *Andrle* is that women are responsible for child-care. In this instance the application of this stereotype is ambiguous because the pension scheme comparatively benefited women – the disadvantaged group. In that sense the effect of this instance of stereotyping can be said to be positive. On the other hand, the gender-role at issue is precisely what has cabined women so long in a disadvantaged position. The Czech Government – and in extension the Strasbourg Court – reinforce the gender role-type by leaving the pension scheme as it is.

The problem with *Andrle* (and many cases like it²⁵⁴), is the Strasbourg Court’s legal reasoning. Precisely because the stereotyping is ambiguous, the verdict – no discrimination – is not per se problematic. But the Court did not properly explain what was at stake in this case: it did not name the stereotype and its harm. It did not explain that the damage of the Czech pension scheme is that it perpetuates stereotypes that have historically ensured women’s subordinated position. Nor did it explain that these kinds of benefits schemes encourage fathers and mothers to assume traditional roles when it comes to the work-family balance. Moreover, the Czech Government had argued in *Andrle* that “changes in the organisation of family life were evolving only very slowly in the Czech Republic”.²⁵⁵ The Government suggests that it plays no role in either changing or reinforcing gender role-types, and that its laws are only a reaction to social circumstances, instead of a shaping force in society. The

²⁵² *Id.* at ¶ 37.

²⁵³ *Id.* at ¶ 58 at 60.

²⁵⁴ *See, e.g.,* *Stec v. United Kingdom*, App. No. 65731/01, 12 April 2006, 43 Eur. H.R. Rep. 47, ¶ 62 and 64 (2006).

²⁵⁵ *Andrle v. Czech Republic*, App. No. 6268/08, 17 February 2011, ¶ 38.

Government basically denies that it can have a catalytic role in changing traditional stereotypes. The Strasbourg Court erred in going along with this argument.

What follows from the ambiguousness of this kind of well-meant stereotyping, is that the Strasbourg Court cannot productively look to the U.S. or Canadian Supreme Courts to see what way it should decide in cases that concern protective or ameliorative measures. The Strasbourg Court will have to decide on the invidiousness of stereotypes on a case by case basis. The point is, however, that the ECtHR can and should gain insights from across the Atlantic on how better to address stereotyping in its legal reasoning.

B) Stereotypes Take Different Shapes; Statistical and Prescriptive Stereotypes Can Also Be Invidious

The first transatlantic message for the ECtHR is that stereotypes come in several forms. This article has shown that the American jurisprudence contains a fuller account of these forms than the Canadian jurisprudence. The U.S. Supreme Court has recognized role-typing, false, statistical, and prescriptive stereotypes.²⁵⁶ So far, the ECtHR has only acknowledged the first two of these four, the most prominent example of a role-typing case being *Konstantin Markin v. Russia*, and a good example of a false stereotyping case being *Aksu v. Turkey*.²⁵⁷ This means that the ECtHR still lacks a strong record on the wrongs of statistical and prescriptive stereotypes – despite the fact that both these types have surfaced repeatedly in the Strasbourg case law. Examples of statistical stereotypes can be found in British cases that concern the unavailability of widow’s benefits for widowers: the widow’s benefits scheme is based on the (statistically correct) assumption that older widows face particular financial hardship.²⁵⁸ This is a statistical stereotype that is a result of a role-type, namely the male breadwinner model.²⁵⁹ Prescriptive stereotypes, on the other hand, have surfaced for example in cases concerning abortion. The prescriptive stereotype “a (prospective) mother should sacrifice herself for her child” is at the core of several Polish abortion cases, such as *P. and S. v. Poland* (2012), in which the applicant – a fourteen-

²⁵⁶ See *supra* Part III.B.

²⁵⁷ *Konstantin Markin v. Russia* (GC), App. No. 30078/06, 56 Eur. H.R. Rep. 8 (2013); and *Aksu v. Turkey* (GC), App. Nos. 4149/04; 41029/04, 15 March 2012. See *supra* Part II.B.

²⁵⁸ *Runkee and White*, App. Nos. 42949/98 and 53134/99, 10 May 2007, ¶ 37.

²⁵⁹ See similarly *Abdulaziz, Cabales, and Balkandali v. United Kingdom* A 94 (1985); 7 Eur. H.R. Rep. 471, ¶ 75 (“the Contracting States in this area laid particular stress on what they described as a statistical fact: men were more likely to seek work than women.”).

year-old girl who was pregnant as a result of rape – was told by several health care professionals that she should carry the pregnancy to term even though she did not want to.²⁶⁰

It is not necessary that the Strasbourg Court explicates, every time it is confronted with a stereotype, exactly what form the stereotype takes. What the Court should name is the *content* of a stereotype, not so much its form. In order to be able to do that, however, the Court should be aware that stereotypes come in different guises and that all forms of stereotype – including statistical and prescriptive ones – can be harmful.

C) To Distinguish Whether a Stereotype is Invidious Requires a Contextual Analysis

What the ECtHR should take on board from the Canadian jurisprudence is the emphasis on contextual analysis. The Canadian approach to stereotyping is unduly formalistic because the Supreme Court associates the stereotype concept too strongly with the question of fit.²⁶¹ But in the wider Canadian equal protection doctrine there are certainly elements that can give the stereotype concept a more transformative direction. Especially the four contextual factors of the *Law* case – pre-existing disadvantage, fit/correspondence, ameliorative purpose, and the nature of the interest – are useful to distinguish acceptable from invidious stereotyping. All four, not just the correspondence factor, can help to determine whether or not the *impact* of a stereotype *on an applicant* is such that the Strasbourg Court should be suspicious of the stereotype. The words “impact on an applicant” are highlighted to emphasize what is important: the ECtHR should not, like the Canadian Supreme Court is prone to do, dilute the stereotyping enquiry into one-sided policy analysis.²⁶²

It is especially crucial to involve the first factor, pre-existing disadvantage, in the analysis.²⁶³ If a stereotype concerns a group that has historically suffered from disadvantage, there is a strong likelihood that the stereotype in question is invidious. This emphasis on pre-existing disadvantage should not be difficult for the ECtHR to adopt in stereotyping cases, as it accords well with the existing Strasbourg case law on “vulnerable groups.”²⁶⁴ In judgments concerning people living with HIV and people with a mental disability, for example, the Court has announced that it will carefully scrutinize restrictions on

²⁶⁰ P. and S. v. Poland, App. No. 57375/08, 30 October 2012. See also Tysic v. Poland, App. No. 5410/03, 20 March 2007; R.R. v. Poland, App. No. 27617/04, 26 May 2011.

²⁶¹ See *supra* Part IV.D.

²⁶² *Id.*

²⁶³ Cf. Quebec (Attorney General) v. A., [2013] S.C.C. 5, ¶ 176 (Can).

²⁶⁴ See Lourdes Peroni & Alexandra Timmer, *Vulnerable Groups: the Promise of an Emergent Concept in European Human Rights Convention Law*, 11 I•CON 1056 (2013).

fundamental rights that are applied to groups which have “suffered considerable discrimination in the past.”²⁶⁵ “The reason for this approach”, says the Court, “is that such groups were historically subject to prejudice with lasting consequences, resulting in their social exclusion. Such prejudice may entail legislative stereotyping which prohibits the individualised evaluation of their capacities and need”.²⁶⁶

In light of all the criticism of the *Law* judgment and the Canadian Supreme Court’s use of the four factors in its subsequent case law, this article does not intend to reify these factors. It is merely suggested that they can provide useful guidance for the ECtHR’s inquiry into stereotypes: which factors will be helpful will depend on the facts of the case.²⁶⁷ In relatively easy cases all contextual factors will point the same way. For example, in *Alajos Kiss v. Hungary*, the ECtHR case about the automatic disenfranchisement of people under guardianship, all factors would point towards the application of the stereotype that people who have been appointed a guardian are incapable of voting as having a harmful effect on the people affected.²⁶⁸ The people affected are mostly mentally disabled adults, who have historically suffered many disadvantages (factor one); the fit between the blanket disenfranchisement and the actual capacities of people under guardianship is very tenuous (factor two); the rule serves no ameliorative purpose (factor three); and the interest affected is the applicant’s ability to vote, which is a fundamental right that ensures full membership of society (factor four).

In the harder cases, however, notably those concerning ameliorative programs, the four contextual factors will not all point in the same direction. As was noted above, whether a stereotype is harmful is then ambiguous.²⁶⁹ Examples include the ECtHR’s social benefits cases that concern differential treatment on the ground of sex, such as *Andrle v. Czech Republic*²⁷⁰ and *Runkee and White v. UK*, where the Governments could argue that their scheme was devised so as to benefit women (the third contextual factor).²⁷¹ In these harder cases the ECtHR will have to balance the several contextual factors. In this respect, the ECtHR can draw on the case law of the Canadian Supreme Court, which has

²⁶⁵ *Alajos Kiss v. Hungary*, App. No. 38832/06, 20 May 2010 ¶ 42; *Kiyutin v. Russia*, App. No. 2700/10, 53 Eur. H.R. Rep. 26 ¶ 63 (2011).

²⁶⁶ *Id.*

²⁶⁷ The Canadian Supreme Court itself also emphasizes that which factors need to be canvassed depends on the nature of the case and that flexibility is important in this respect. See *Withler v. Canada*, [2011] 1 S.C.R. 396, ¶ 66 (Can.).

²⁶⁸ *Alajos Kiss v. Hungary*, App. No. 38832/06, 20 May 2010.

²⁶⁹ See *supra* Part V.A.

²⁷⁰ *Andrle v. Czech Republic*, App. No. 6268/08, 17 February 2011. See *supra* Part V.A.

²⁷¹ *Runkee and White*, App. Nos. 42949/98 and 53134/99, 10 May 2007. See *supra* text accompanying notes 63-65. For more discussion of these social benefits cases, see *Timmer*, *supra* note 13, at 735-736.

decided that when a stereotype is deployed for a “good” purpose, the requirement of “fit” (the second contextual factor) can be interpreted more leniently.

D) Stereotyping is Connected to Discrimination in a Self-Reinforcing Circle

This article has claimed that it is problematic that the ECtHR often fails to see stereotyping as a discrimination issue.²⁷² However, the precise connections and distinctions between stereotyping and discrimination are notoriously difficult to fathom. Indeed, social psychologists have analyzed these connections extensively.²⁷³ Nevertheless, the U.S. Supreme Court has managed to create a rich account of the connections between stereotyping and discrimination, which the ECtHR would do well to take notice of.

The U.S. Supreme Court has made clear that stereotyping and discrimination are connected in a self-reinforcing invidious cycle. In essence, that Court describes this circle in three steps: stereotypes can form a *manifestation* of discrimination, as well as a *rationalization* and a *cause* of discrimination. The Supreme Court’s reasoning in *Hibbs* (quoted in Part III.C) exposes this cycle brilliantly.²⁷⁴ First, stereotypes are manifested as discrimination: in the *Hibbs* case the Court notes that there are differential leave-taking policies for male workers and female workers (employers often “discouraged [men] from taking leave”).²⁷⁵ This situation of discrimination is rationalized, or justified, by the idea that “women are mothers first, and workers second”, and that the family is “the woman’s domain.”²⁷⁶ These stereotypes, in turn, create further discrimination by “forc[ing] women to continue to assume the role of primary family caregiver, and foster[ing] employers’ stereotypical views about women’s commitment to work and their value as employees.”²⁷⁷ On a case-by-case basis this cycle may be difficult to detect, the Supreme Court notes.²⁷⁸ But, through its reasoning in cases like *Hibbs*, the Supreme Court succeeds in showing the structural nature of inequality – the Court unveils the *patterns* of discrimination that result from invidious stereotyping.

So far, the ECtHR has only recognized one part of the circle: that stereotypes can be wrongfully used by the State as a rationalization (or in other words: a justification) of discrimination. *Konstantin*

²⁷² See *supra* Part II.D.

²⁷³ See, e.g., DOVIDIO ET.AL., *supra* note 4; NELSON, *supra* note 7; SCHNEIDER, *supra* note 5, at 266-320.

²⁷⁴ Nevada Department of Human Resources v. Hibbs, 538 U.S. 721 (2003). See *supra* text accompanying note 141.

²⁷⁵ *Id.* at 730-731 and 736.

²⁷⁶ *Id.* at 736.

²⁷⁷ *Id.*

²⁷⁸ *Id.*

Markin v. Russia is, as discussed, the clearest instance where the ECtHR makes this point.²⁷⁹ The Strasbourg Court does not yet seem to acknowledge the other connections between stereotyping and discrimination, namely that stereotyping can also be a manifestation as well as a cause of (further) discrimination. Thus, in the *Markin* case, the self-sustaining cycle goes as follows. The two major stereotypes on which the Russian Constitutional Court relied in *Markin* are that women do not play an important role in the military and that women have a special social role associated with motherhood.²⁸⁰ To begin, the stereotype that women do not play major roles in the military is statistically correct: women only constitute approximately 10% in the Russian military and are extremely underrepresented in its leadership positions.²⁸¹ In the eyes of the Government, this fact then justifies giving parental leave to servicewomen but not servicemen (as giving it too servicemen would have too much of impact on the operational effectiveness of the military). This rule then forces servicewomen to assume care for their children and forces servicemen to continue working; which then has the effect of reinforcing the initial gender stereotypes.

The idea that stereotyping *causes* discrimination is especially important. As a human rights court, the ECtHR should not only treat the symptoms but also attack the disease. The Court should seek to weed out the roots of discrimination.

E) Two Ways of Using Article 14 ECHR and Integrating the Margin of Appreciation

Because of this invidious cycle the Strasbourg Court should consistently frame stereotyping as an Article 14 issue. This entails that the Court recognize that stereotyping falls within the scope of Article 14.²⁸² Subsequently, the Court will be faced with two questions: at which point in its analysis should the Court assess the invidiousness of stereotypes; and how does the margin of appreciation fit into the analysis? These questions are interrelated.

There are two alternative routes that the Strasbourg Court could take in order to integrate an anti-stereotyping approach into its legal analysis. The first option is that the ECtHR assesses the invidiousness of stereotypes under the *scope* of Article 14 (in conjunction with Article 8 or another Convention provision). As this article argued, the ECtHR could make this assessment on the basis of the

²⁷⁹ Konstantin Markin v. Russia (GC), App. No. 30078/06, 56 Eur. H.R. Rep. 8 ¶ 143 (2013). See *supra* Part II.B.

²⁸⁰ *Id.* at ¶ 34.

²⁸¹ Jennifer G. Mathers, *Russia's Women Soldiers in the Twenty-First Century*, 1 MINERVA J. OF WOMEN AND WAR 8 (2007).

²⁸² See *supra* II.D.

four contextual factors from the Canadian *Law* case.²⁸³ Up to this point, this is the Canadian route. In the event that the ECtHR determines that a stereotype is invidious, it should then narrow the margin of appreciation in its analysis of justifications. This is where this route diverges from the Canadian model: the Canadian Supreme Court rarely proceeds to inquire whether an s.15 violation can be justified.²⁸⁴ In other words, practically the whole of the Canadian analysis occurs under the scope of the right to equality.

The ECtHR's second option would be to assess the invidiousness of stereotypes during the second stage of the analysis: as part of the analysis of *proportionality*. The four *Law* factors (pre-existing disadvantage, fit/correspondence, ameliorative purpose, and the nature of the interest) lend themselves well to the analysis of proportionality in the strict sense, namely balancing.²⁸⁵ On one side of the balance, the ECtHR could assess what kind of impact a stereotype has on the applicant and her group, and on the other side the Court could weigh the countervailing public interests. As long as the Court makes a careful analysis of what is on the applicant's side of the balance – in other words, a careful analysis of the impact of a stereotype – it could apply the margin of appreciation doctrine as usual (in so far as there is a “usual” when it comes to this doctrine).

Either of these routes could deliver fine anti-stereotyping reasoning. The second route, where the crux of the stereotyping assessment would fall under the proportionality analysis, is probably more palatable to the Strasbourg Court, given its habitual emphasis on proportionality. The important point is that the ECtHR recognizes that stereotyping gives rise to an Article 14 claim and then examines stereotypes and their invidiousness carefully.

VI. Conclusion

Not all stereotypes are bad.²⁸⁶ Moreover, we cannot completely deny ourselves, or the legislator, the use of generalizations about groups of people. As a result, it is hard to develop a proper legal response to stereotyping. This comparative legal analysis has shown that the ECtHR can productively borrow from

²⁸³ *Law v. Canada*, [1999] 1 S.C.R. 497 (Can.).

²⁸⁴ Section 1 of the Canadian Charter does provide for the possibility of reasonable limitations to the rights set forth in the Charter. The Supreme Court has been extensively criticized for not using Section 1 in equality cases, by doing all of the justifications analysis already under s.15. See, e.g., McIntyre, *supra* note 242; Moreau, *supra* note 184, at 425-430.

²⁸⁵ See generally, AHARON BARAK, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS 340-370 (2012).

²⁸⁶ Cf. SCHNEIDER, *supra* note 5, at 19; and Suk, *supra* note 11.

both the American and the Canadian Supreme Courts in this respect. At a minimum, a proper legal response requires that courts name stereotypes well and carefully examine their harm. At its best, anti-stereotyping reasoning exposes and targets the often hidden structures of inequality and discrimination. This is where the stereotyping concept can have real added value for the Strasbourg Court. American and Canadian equal protection law teaches the Strasbourg Court that stereotyping and discrimination are joined together in a cycle that sustains itself. That is to say: stereotypes can be a manifestation of discrimination, as well as a rationalization and a cause of (further) discrimination. The goal of addressing stereotypes through law is to break that circle open. The Strasbourg Court is not there yet. So far it has only recognized one part of the circle, namely that stereotypes are (often) misused to justify discrimination.

The comparative analysis has also shown, however, that both the American and the Canadian jurisprudence have their weaknesses. Notably, both Supreme Courts sometimes equate stereotypes with unfair generalizations. The ECtHR should not copy such sloppy legal reasoning. Stereotypes can indeed be inaccurate or negative, but they can also be statistically correct, or prescriptive. When stereotypes are conceived of too narrowly (as only raising issues of accuracy), the concept loses its ability to advance transformative equality.

To conclude, the three courts that are examined in this article all struggle and sometimes fail to formulate an appropriate response to stereotyping. The Grand Chamber's recent surge of attention to stereotypes in the cases of *Konstantin Markin* and *Aksu* accordingly presents the ECtHR with an opportunity.²⁸⁷ Building on these cases and on the jurisprudence from the U.S. and Canada, the Strasbourg Court can take up the stereotyping concept and show the way forward. What started as borrowing might then turn into cross-fertilization.²⁸⁸ Now is the time for the Strasbourg Court to step up to the challenge of conceptualizing equality and discrimination more meaningfully.

²⁸⁷ *Konstantin Markin v. Russia* (GC), App. No. 30078/06, 56 Eur. H.R. Rep. 8 (2013); *Aksu v. Turkey* (GC), App. Nos. 4149/04; 41029/04, 15 March 2012.

²⁸⁸ Provided of course that the American and Canadian Supreme Courts are open to this, which in the case of the U.S. Supreme Court is doubtful. See, e.g., Norman Dorsen, *The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer*, 3 *ICON* 519 (2005).

Preface Chapters Four and Five

The next two chapters contain two articles on the concept of vulnerability. Chapter Four, entitled “Vulnerable Groups: the Promise of an Emergent Concept in European Human Rights Convention Law”, is written together with my colleague from Ghent University, Lourdes Peroni. It is difficult to say who is responsible for writing which part; this has truly been a joint endeavor and each part of the article has been discussed between ourselves and rewritten many times over. Nevertheless, here follows an overview of who has been the person primary responsible for each part and section of Chapter Four:

	Lourdes	Alexandra
Part		I
	II.A	II.B and C
	III. A and B	III.C
	IV.A	IV.B
		V
	VI	

The writing and research for Chapter Four was completed in February 2013. The research for Chapter Five, entitled “A Quiet Revolution: Vulnerability in the European Court of Human Rights”, was in the main part completed in September 2012.

4. Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law

Lourdes Peroni and Alexandra Timmer*

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Abstract

The concept of vulnerable groups is gaining momentum in the case law of the European Court of Human Rights. The Court has so far used it in cases concerning Roma, people with mental disabilities, people living with HIV and asylum seekers. Yet the appearance of the vulnerable-group concept in the Court's legal reasoning has so far escaped scholarly attention. Drawing on theoretical debates on vulnerability as well as on the Court's case law, this Article offers a critical assessment of the concept. Reasoning in terms of vulnerable groups opens a number of possibilities, most notably, the opportunity to move closer to a more robust idea of equality. However, the concept also has some inherent difficulties. This Article argues for a reflective use of the concept and points out ways in which the Court can avoid its pitfalls.

I. Introduction

* Ph.D. Researchers, Faculty of Law of Ghent University. We thank Eva Brems, Marie-Bénédicte Dembour, Anna Grear, Mathias Möschel, Stijn Smet and an anonymous reviewer for their valuable comments on earlier versions of this article. We had inspiring conversations with six judges of the European Court of Human Rights in Strasbourg, France in June 2011 and we wish to thank them too. We are also grateful to Martha Fineman for generously hosting us as Visiting Scholars at Emory Law School in Atlanta, Georgia within the framework of the Vulnerability and the Human Condition Initiative. The research for this paper was conducted within the framework of the European Research Council (ERC) Starting Grant project entitled "Strengthening the European Court of Human Rights: More Accountability through Better Legal Reasoning".

Though each and every move of the European Court of Human Rights¹ is intensely followed these days,² one recent development in the front lines of its reasoning has so far escaped scholarly attention: the emergence of the concept of vulnerable groups. The Strasbourg Court originally used this concept in relation to the Roma minority. “[A]s a result of their turbulent history”, the Court has held, “the Roma have become a specific type of disadvantaged and vulnerable minority” in need of special protection.³ In recent years, the concept has gained legal momentum when the Court started to regard persons with mental disabilities as a “particularly vulnerable group in society, who have suffered considerable discrimination in the past”.⁴ The Court has further expanded the list of vulnerable groups to asylum seekers⁵ and people living with HIV.⁶

In this Article, we trace the characterization and implications of the concept of vulnerable groups in the Strasbourg case law. Arguing for a reflective use of group vulnerability, we offer a critical assessment of the concept by reference both to theoretical debates on vulnerability and to the Court’s case law.⁷

We show that the Court’s use of the term “vulnerable groups” is not mere rhetorical flourish. The term *does* something: it allows the Court to address different aspects of inequality in a more substantive manner. We argue that, for this reason, the emergence of the concept represents a positive development in the Court’s case law. Yet, for all its power to further substantive equality, the concept also risks sustaining the very exclusion and inequality it aims to redress. We maintain that, if the Court wishes to retain the capability of “vulnerable groups” to fulfill its equality mission, it will have to attend to the stigmatizing, essentializing and stereotyping risks associated to the concept.

Our analysis proceeds in four parts. We begin by locating the broader theoretical context within which vulnerability has been used as a critical tool and by exploring the links between vulnerability and

¹ Hereinafter, “the Court” or “the Strasbourg Court.”

² Both the Court and its critics are especially closely followed in the legal blogosphere. See ECHR Blog, <http://echrblog.blogspot.com>; Strasbourg Observers, <http://strasbourgobservers.com>; and UK Human Rights Blog, <http://ukhumanrightsblog.com>.

³ See, e.g., *D.H. and Others v. the Czech Republic* (GC), App. No. 57325/00, 47 Eur. H. R. Rep. 3, ¶ 182 (2007).

⁴ *Alajos Kiss v. Hungary*, App. No. 38832/06, 20 May 2010 ¶ 42.

⁵ *M.S.S. v. Belgium and Greece*, App. No. 30696/09, 53 Eur. H.R. Rep. 2, ¶ 251 (2011).

⁶ *Kiyutin v. Russia*, App. No. 2700/10, 53 Eur. H.R. Rep. 26 ¶ 63 (2011).

⁷ We will confine ourselves to the case law in which the Court speaks of vulnerable *groups*. There is a considerable amount of case law in which the Court recognizes that the applicant is in a vulnerable position individually, notably in cases concerning prisoners or children. These cases, however, lack a group-centered analysis and therefore raise different kinds of questions than the ones we address in this Article. For an analysis of this other area of the Court’s vulnerability case law, see Alexandra Timmer, *A Quiet Revolution: Vulnerability in the European Court of Human Rights*, in *VULNERABILITY: VALUE AND CRITIQUE* (Martha Fineman & Anna Gear eds., forthcoming 2013).

human rights (I). We continue with an assessment of the ways in which the Court has evoked the notion of vulnerable groups, highlighting the pitfalls inherent in the concept and offering guidance on how the Court could circumvent them. (II). Then, we evaluate the consequences that the Court's use of vulnerable groups has had in its case law and show how the concept has reinvigorated the Strasbourg antidiscrimination and equality case law. (III). Lastly, we offer some thoughts on whether the Court's use of the vulnerable-group concept may lead the Court to overstep its proper subsidiary role (IV).

II. The Concept of Vulnerability and Its Relationship to Human Rights

Vulnerability is a concept fraught with paradox. To start with, the concept is in common use but its meaning is imprecise and contested. Confusing,⁸ complex,⁹ vague,¹⁰ ambiguous¹¹ are but a few of the labels scholars across disciplines have used to refer to it. (Bio)ethics and law, in particular, are disciplines which have spawned an extensive literature on vulnerability. As the purpose of this Article is to analyze the Strasbourg Court's deployment of the vulnerable-group concept, we will base our account of vulnerability primarily on legal scholarship.

A) Meanings of Vulnerability

A central paradox of vulnerability is that it is both universal and particular. Both of these features arise in the first place from our embodiment:¹² as embodied beings we are all vulnerable, but we experience this vulnerability uniquely through our individual bodies. The centrality of the corporeal dimension of vulnerability is reflected in the term's etymology: the term stems from the Latin *vulnus*, which means, "wound."¹³ Turning first to the meaning of vulnerability in the universal sense, it comes as no surprise

⁸ Jan Helge Solbakk, *Vulnerability: A Futile or Useful Principle in Healthcare Ethics?*, in THE SAGE HANDBOOK OF HEALTH CARE ETHICS 228, 229 (Ruth Chadwick, Henk ten Have & Eric M. Meslin eds., 2011).

⁹ *Id.*

¹⁰ Mary C. Ruof, *Vulnerability, Vulnerable Populations, and Policy*, 14 KENNEDY INSTITUTE OF ETHICS JOURNAL 411, 411 (2004).

¹¹ Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 9 (2008-2009).

¹² *Id.* at 9.

¹³ BRYAN S. TURNER, VULNERABILITY AND HUMAN RIGHTS 28 (2006).

that harm and suffering feature centrally in most accounts of vulnerability.¹⁴ Mary Neal neatly summarizes the literature:

[V]ulnerability speaks to our universal capacity for suffering, in two ways. First, I am vulnerable because I depend upon the co-operation of others (including, importantly, the State) . . . Second, I am vulnerable because I am penetrable; I am permanently open and exposed to hurts and harms of various kinds.¹⁵

Thus, as vulnerable subjects we are constantly susceptible to harm. Harm, of course, comes in many varieties that intersect and reinforce one another. Injuries can be bodily, moral,¹⁶ psychological,¹⁷ economic and institutional,¹⁸ just to mention a few. These different forms of harm already hint at the ways in which vulnerability is particular (as well as universal). Our “different forms of embodiment” and our different positions within “webs of economic and institutional relationships”¹⁹ make that each of us experiences vulnerability uniquely. Martha Fineman points out that the experience of vulnerability “is greatly influenced by the quality and quantity of resources we possess or can command.”²⁰

Recently, however, theorists have moved towards an understanding of vulnerability that expands beyond (universal and particular) suffering, to encompass positive aspects.²¹ Human vulnerability is generative of suffering, so the argument runs, but also of empathy, pleasure, innovation, social institutions, intimacy and social-connectedness. Martha Fineman argues that this generative capacity of vulnerability “presents opportunities for innovation and growth, creativity, and fulfillment. It makes us reach out to others, form relationships, and build institutions.”²² Indeed, Fineman insists that we need to re-conceptualize vulnerability in this positive manner in order to get rid of the stigmatizing effects otherwise attached to the term.²³

¹⁴ See, e.g., JUDITH BUTLER, *PRECARIOUS LIFE: THE POWERS AND MOURNING OF VIOLENCE* xii (2006); ROBERT E. GOODIN, *PROTECTING THE VULNERABLE: A REANALYSIS OF OUR SOCIAL RESPONSIBILITIES* 110 (1985); TURNER, *supra* note 13 at 27.

¹⁵ Mary Neal, “*Not Gods but Animals*”: *Human Dignity and Vulnerable Subjecthood*, 34 *LIVERPOOL LAW REVIEW* (forthcoming, 2013).

¹⁶ TURNER, *supra* note 13, at 28.

¹⁷ *Id.*

¹⁸ Martha Albertson Fineman, *The Vulnerable Subject and the Responsive State*, 60 *EMORY L.J.* 251, 268 (2010).

¹⁹ *Id.* at 269.

²⁰ Fineman, *supra* note 11, at 10.

²¹ See, e.g., DEBRA BERGOFFEN, *CONTESTING THE POLITICS OF GENOCIDAL RAPE: AFFIRMING THE DIGNITY OF THE VULNERABLE BODY* 101-119 (2012); Martha Albertson Fineman, “*Elderly*” as *Vulnerable: Rethinking the Nature of Individual and Societal Responsibility*, 20 *THE ELDER LAW JOURNAL* 101 (2012); and ANNA GREAR, *REDIRECTING HUMAN RIGHTS: FACING THE CHALLENGE OF CORPORATE LEGAL HUMANITY* 132-33 (2010).

²² Fineman, *supra* note 21, at 126.

²³ *Id.*

B) Vulnerability as a Heuristic Device

Fineman has described vulnerability as a heuristic device that allows us to “examine hidden assumptions and biases folded into legal . . . practices.”²⁴ The fact that vulnerability can be used as a heuristic device points to the next paradox inherent in the concept: it can be deployed both to diagnose the ‘is’ and the ‘ought’. In other words, vulnerability is analytically both a descriptive and prescriptive tool. The problem is that the bridge between the descriptive and the prescriptive powers of vulnerability is not easy to build. Especially ethicists struggle with the question how vulnerability can have prescriptive force, since embodied vulnerability is known to trigger both care and abuse.²⁵ Scholars from different disciplines agree, however, that using vulnerability as a critical tool involves exploring how societal or institutional arrangements originate, sustain, and reinforce vulnerabilities.²⁶ As was mentioned above, part of the reason why people are vulnerable is because they are inevitably dependent on the cooperation of others. Vulnerability is therefore inherently a “relational” concept,²⁷ which supplements “attention to the individual subject by placing him/her in social context.”²⁸ In the next Part, we will adopt a similar contextual approach to vulnerability in our case law analysis.

Within the legal literature there is a tension between group-based and universality-based deployments of vulnerability. This seems due to the paradoxical nature of the concept. On the one hand vulnerability is often used to analyze specific populations²⁹ – on the other hand Martha Fineman has developed a vulnerability thesis that is expressly universal in its scope and “post identity.”³⁰ Fineman objects to applying the term vulnerability only to specific groups. She maintains that, as long as vulnerability is only associated with certain (marginalized) identities, the liberal myth that, “normally,”

²⁴ Fineman, *supra* note 18, at 266 n.53.

²⁵ Ann V. Murphy, “Reality Check”: *Rethinking the Ethics of Vulnerability*, in THEORIZING SEXUAL VIOLENCE 55 (Renée J. Heberle & Victoria Grace eds., 2009).

²⁶ See, e.g., Fineman, *supra* note 11; GOODIN, *supra* note 14, at 191; PEADAR KIRBY, VULNERABILITY AND VIOLENCE: THE IMPACT OF GLOBALISATION (2006); Florencia Luna, *Elucidating the Concept of Vulnerability: Layers Not Labels*, 2 INTERNATIONAL JOURNAL OF FEMINIST APPROACHES TO BIOETHICS 121 (2009); and Wouter Vandenhole & Julie Ryngaert, *Mainstreaming Children’s Rights in Migration Litigation: ECtHR, Muskhadzhiyeva and others v. Belgium*, in DIVERSITY AND EUROPEAN HUMAN RIGHTS: REWRITING JUDGMENTS OF THE ECHR 68 (Eva Brems ed., 2012).

²⁷ Luna, *supra* note 26, at 129.

²⁸ Fineman, *supra* note 11, at 13.

²⁹ See, e.g., Audrey R. Chapman & Benjamin Carbonetti, *Human Rights Protections for Vulnerable and Disadvantaged Groups: The Contributions of the UN Committee on Economic, Social and Cultural Rights*, 33 HUM. RTS. Q. 682 (2011).

³⁰ Fineman, *supra* note 11, at 1.

people are self-sufficient, independent, and autonomous is sustained.³¹ This myth – which is in her view pervasive in American society – has led to an impoverished notion of what the function of the State is and has moreover legitimized rampant inequality. Instead, Fineman proposes to understand vulnerability as a “universal, inevitable, enduring aspect of the human condition” and posits that the proper role of the State is to be responsive to this.³² She presents her vulnerability thesis as an alternative to traditional group-based U.S. equal protection analysis.³³ Fineman argues that her analysis is capable of delivering substantive equality (where the traditional analysis has failed) because her thesis turns the inquiry to the “institutional practices that produce the identities and inequalities in the first place.”³⁴

The vulnerable-group reasoning of the Strasbourg Court seems to fit ill with Fineman’s thesis. While Fineman supports vulnerability for its potential of capturing the universal, the Court does it for its ability to capture the particular. In our view, however, there is no inherent impediment to reconciling these two approaches on a *conceptual* level – on the contrary; that would fit the concept’s paradoxical nature well. When we asked a Strasbourg judge about the Court’s reasoning, he replied: “All applicants are vulnerable, but some are more vulnerable than others.” The judge thus neatly merged the universal approach with the group-based approach. This reply also points to the fact that, as we will show in the next Part, the Court’s reasoning is a way of recognizing that people are differently vulnerable; that vulnerability is partially constructed depending on economic, political and social processes of inclusion and exclusion. Whether the Court in practice manages to handle vulnerability as a critical tool with the care that is required – without falling in the pitfalls that Fineman and others warn against – is also the subject of the next Part.

C) Human Rights Law and Vulnerability

³¹ Fineman’s vulnerability thesis builds in this respect on her earlier work that concerned autonomy and dependency. See MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* (2004).

³² Fineman, *supra* note 11, at 8.

³³ Unfortunately, it falls outside the scope of this Article to take a comparative angle on the Strasbourg Court’s vulnerable-group reasoning. The American “discrete and insular minorities” approach has arguably parallels with the Court’s vulnerable-group approach. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152, n.4 (1938). Moreover, American scholars in the anti-subordination tradition have linked group-based equality analysis to social exclusion, be it in the form of prejudice and stigmatization or in the form of material disadvantage. See, e.g., Jack M. Balkin & Reva Siegel, *The American Civil Rights Tradition: Anti-Classification or Anti-Subordination*, 58 U. MIAMI L. REV. 9 (2003-2004). Others, famously John Hart Ely, reason in terms of minorities’ exclusion from the political process. J.H. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 103 (1980). Comparative perspectives on vulnerable-group reasoning would make fascinating material for another scholarly project.

³⁴ Fineman, *supra* note 11, at 16.

Before moving on to the case law analysis, it bears standing still for a moment and consider what kind of role vulnerability has so far played in the human rights context. At first sight, human rights lawyers suffer less from the is/ought-dilemma precisely because they can refer to the human rights corpus, which in essence lays down the rule that abuse of human embodied vulnerability is prohibited. However, as we shall see, critically minded human rights scholars have shown that the story is not that straightforward. The relationship between vulnerability and human rights is a contested terrain.³⁵

In view of the topic of this paper the crucial question is: *are human rights so construed as to protect the most vulnerable people?* On a conceptual level, Anna Grear shows, the answer to this question is complex and bifurcated.³⁶ Grear argues that the Universal Declaration of Human Rights ('UDHR')³⁷ paradigm contains two contradictory impulses. On the one hand, the whole human rights system is founded on a concern for embodied vulnerability.³⁸ Grear presents a genealogy of human rights in which she shows that this is the case both during the idea's early articulations in the 18th century and when the UDHR was created as a reaction to the horrors of World War II. On the other hand, the liberal legal subject has been imported into the human rights structure: archetypically this is a rationalistic and quasi-disembodied subject.³⁹ In many ways, this subject is conceived of as *invulnerable*.⁴⁰ What flows from the dominance of the liberal quasi-disembodied subject in human rights law is a set of deeply troubling exclusions. Drawing on a well-known theme from feminist legal theory,⁴¹ Grear argues that the many groups that do not fit the liberal archetype – women, dispossessed, people of color and (especially) asylum seekers – fall outside the scope of the purportedly universal protection of human rights.

³⁵ The scholarly terrain is moreover rapidly expanding. Recent publications include: BERGOFFEN, *supra* note 21; Chapman & Carbonetti, *supra* note 29; GREAR, *supra* note 21; and TURNER, *supra* note 13.

³⁶ GREAR, *supra* note 21.

³⁷ G.A. Res. 217, U.N. GAOR, 3d Sess., U.N. Doc A/819, Dec. 10, 1948. The European Convention on Human Rights is based on the UDHR.

³⁸ Bryan Turner has also conceptualized vulnerability as the foundation of the human rights regime. TURNER, *supra* note 13.

³⁹ Anna Grear, *Challenging Corporate "Humanity": Legal Disembodiment, Embodiment and Human Rights*, 7 HUM. RTS. L. REV. 511, 521-534 (2007); and GREAR, *supra* note 21, at 96-113. See generally Ngaire Naffine, *Who are Law's Persons? From Cheshire Cats to Responsible Subjects*, 66 THE MODERN LAW REVIEW 346 (2003).

⁴⁰ BERGOFFEN, *supra* note 21, at 109 ("current human rights paradigms take their cue from the masculine image of the invulnerable body.").

⁴¹ See, e.g., Catharine A. MacKinnon, *Crimes of War, Crimes of Peace*, 4 UCLA WOMEN'S LAW JOURNAL 59 (1993-1994); and Dianne Otto, *Lost in Translation: Re-Scripting the Sexed Subjects of International Human Rights Law*, in INTERNATIONAL LAW AND ITS OTHERS 318 (Anne Orford ed., 2006).

Of course, many within the human rights movement are aware that the human rights universal fails to include marginalized subjects. In response to this problem, specific treaties have proliferated, such as the *Convention on the Rights of Persons with Disabilities*;⁴² the *Convention on the Elimination of all Forms of Discrimination against Women*;⁴³ the *Convention on the Elimination of Racial Discrimination*;⁴⁴ and the *Convention on the Rights of the Child*.⁴⁵ Gear interprets the creation of these specific human rights instruments as repeated critiques of “the closures of the abstract universal” and “the outcome of quasi-disembodiment.”⁴⁶ Aside from the specific treaties, general treaty bodies – in their General Comments and Concluding Observations – also regularly emphasize the imperative to pay special attention to the needs of particularly vulnerable people.⁴⁷ The same holds true for human rights commissioners.⁴⁸ In academic scholarship, lastly, these critiques are mirrored in the writings of what Marie-Bénédicte Dembour has termed “protest scholars”; those who conceive of human rights as articulating “rightful claims made by or on behalf of the poor, the underprivileged and the oppressed.”⁴⁹

So to go back to the question whether human rights law is so construed as to protect the most vulnerable people: the answer is yes and no (again a paradox!). Drawing on the work of Gear, the subject of human rights law is arguably not an embodied vulnerable subject – let alone a highly vulnerable subject. We would wish that the Court is only doing its regular job by reasoning from vulnerability, but the Court’s reliance on the concept is more complex than that. Our diagnosis is this: in response to the exclusions of human rights law, the Strasbourg Court has been forced to attend to the constructed disadvantage of certain groups, and in so doing, has deployed the concept of group

⁴² Adopted 13 Dec. 2006, G.A. Res. 61/106, U.N. GAOR, 61st Sess., Agenda Item 67(b), U.N. Doc. A/RES/61/106 (2006) (entered into force 3 May 2008).

⁴³ Adopted 18 Dec. 1979, G.A. Res. 34/180, U.N. GAOR, 34th Sess., U.N. Doc. A/34/46 (1980), 1249 U.N.T.S. 13 (entered into force 3 Sept. 1981).

⁴⁴ Adopted 21 Dec. 1965, G.A. Res. 2106 (XX), U.N. GAOR, 20th Sess., U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195 (entered into force 4 Jan. 1969).

⁴⁵ Adopted 20 Nov. 1989, G.A. Res. 44/25, U.N. GAOR, 44th Sess., U.N. Doc. A/44/49 (1989), 1577 U.N.T.S. 3 (entered into force 2 Sept. 1990).

⁴⁶ GEAR, *supra* note 21, at 112 (italics removed).

⁴⁷ For example the UN Committee on Economic, Social and Cultural Rights; *see, e.g.*, Chapman & Carbonetti, *supra* note 29.

⁴⁸ THOMAS HAMMERBERG, HUMAN RIGHTS IN EUROPE: NO GROUNDS FOR COMPLACENCY (2011).

⁴⁹ Marie-Bénédicte Dembour, *What Are Human Rights? Four Schools of Thought*, 32 HUM. RTS. Q. 1,3 (2010). Examples of such scholarship are: UPENDRA BAXI, THE FUTURE OF HUMAN RIGHTS (2002); and Colin Harvey, *Protecting the Marginalized?*, in JUDGES, TRANSITION, AND HUMAN RIGHTS 515 (John Morison, Kieran McEvoy & Gordon Anthony eds., 2007).

vulnerability.⁵⁰ As we will now proceed to show, the Court's deployment of the concept has both strengths and weaknesses.

III. Characterization and Risks of the Concept of Vulnerable Groups in the Court's Case Law

The rapid development of the concept of vulnerable groups in recent high-profile judgments of the Strasbourg case law raises several basic questions. How has the Court evoked the concept of group vulnerability? And, are there any risks associated to the Court's characterization and deployment of the concept? Based on these questions, this Part offers a critical assessment of the Court's formulation and use of the concept.

A) *Chapman and the Origin of Group Vulnerability*

The concept of vulnerable groups was introduced in 2001, in *Chapman v. the United Kingdom*, to refer to the Roma minority.⁵¹ The case involved a Roma woman who was evicted from her own land because she stationed her caravan there without planning permission. The Court rejected the applicant's alleged violation of the right to respect for her minority lifestyle (Article 8 ECHR). It also dismissed her discrimination complaint (Article 14 ECHR). The applicant's argument was that the U.K. government prevented her from pursuing a lifestyle that she viewed as central to her cultural tradition: living and travelling in a caravan. The Court's Grand Chamber held:

As intimated in *Buckley*, the vulnerable position of Gypsies as a minority means that some special consideration should be given to their needs and their different lifestyle both in the relevant regulatory planning framework and in reaching decisions in particular cases.⁵²

⁵⁰ We note that, within the Council of Europe, the Strasbourg Court is not alone in this approach. The European Committee of Social Rights, for example, regularly uses the concept of vulnerable groups in its decisions. *See, e.g.*, Centre on Housing Rights and Evictions (COHRE) v. Italy, Complaint No. 58/2009, Merits, 25 June 2010, ¶ 76 (concerning Roma and Sinti); Centre on Housing Rights and Evictions (COHRE) v. Croatia, Complaint No. 52/2008, Merits, 22 June 2010, ¶ 88 (concerning displaced families of Serb ethnicity); and Autism – France v. France, Complaint No. 13/2002, Merits, 4 November 2003, ¶ 53 (concerning persons with autism).

⁵¹ *Chapman v. United Kingdom* (GC), 2001-I; 33 Eur. H.R. Rep. 18, ¶ 96 (2001).

⁵² *Id.* The Court refers to the *Buckley v. the United Kingdom* judgment from 1996, but in that judgment the Court did not actually use the term “vulnerable” to describe Roma.

In this early formulation, the vulnerability of Roma seems to arise primarily from the group's minority status and from the lack of consideration of its minority lifestyle in the planning and decision-making processes. Group vulnerability does not however play a key role in the Court's proportionality reasoning.⁵³ In fact, Ms. Chapman loses the case, mostly as a result of the large margin of appreciation left to States when it comes to the implementation of planning policies, in this case, environmental regulations. Notwithstanding this, *Chapman's* articulation of vulnerability already puts in place the elements that will shape the Court's later formulations of "vulnerable groups": belonging to a group (in this case, the Roma minority) whose vulnerability is partly constructed by broader societal, political and institutional circumstances (in this case, power differentials and a planning framework unresponsive to the needs arising from a way of life different from that of the majority).

B) Group Vulnerability in the Post-Chapman Case Law

i. Characteristics of the Vulnerable-Group Concept: Relational, Particular and Harm-based

In the years following *Chapman*, the Court has broadened and refined the concept's content and scope. As we will discuss, the Court has not only reaffirmed the vulnerability of Roma in different contexts and for a mix of other reasons; it has also extended the list of "vulnerable groups" to persons with mental disabilities, people living with HIV and asylum seekers. However, what exactly ties all these groups together is still not entirely clear, as the Court has not (yet) fully developed a coherent set of indicators to determine what renders a group vulnerable. To be sure, in all the cases, the Court draws on European or international human rights reports and resolutions to determine what it is that makes groups vulnerable.⁵⁴ These references, however, serve to confirm rather than to establish group vulnerability.

Based on a close reading of the case law, our understanding is that the concept of group vulnerability, as used by the Court, has three characteristics: it is relational, particular, and harm-based. The Court's account of group vulnerability is first of all *relational*. As already transpired from *Chapman*,

⁵³ Cf. *Chapman v. United Kingdom* (GC), 2001-I; 33 Eur. H.R. Rep. 18, ¶ 3 (2001) (Ridruejo, Bonello, Tulkens, Strážnická, Lorenzen, Fischbach and Casadevall J., dissenting).

⁵⁴ See, e.g., *D.H. and Others v. the Czech Republic* (GC), App. No. 57325/00, 47 Eur. H. R. Rep. 3, ¶182 (2007) (Roma); *Alajos Kiss v. Hungary*, App. No. 38832/06, 20 May 2010, ¶ 44 (disability); and *M.S.S. v. Belgium and Greece*, App. No. 30696/09, 53 Eur. H.R. Rep. 2, ¶ 251 (2011) (asylum).

the Court locates vulnerability not in the individual alone but rather in her wider social circumstances. The Court's notion of vulnerable groups is thus relational because it views the vulnerability of certain groups as shaped by social, historical and institutional forces. In other words, the Court links the individual applicant's vulnerability to the social or institutional environment, which originates or sustains the vulnerability of the group she is (made) part of. The emphasis on context inherent in the relational character of the Court's understanding of group vulnerability is in line with contemporary analyses that use vulnerability as a critical tool. As we have seen in Part I.B, they all insist on the need to explore the role of societal or institutional arrangements in originating and maintaining vulnerability.

However, contrary to legal scholars' efforts to theorize vulnerability in a universal way – most prominently, Fineman's vulnerability thesis⁵⁵ – the Court's vulnerable subject is not the inherently vulnerable human being. Rather, the Court's vulnerable subject is a particular group member. In our view, this understanding of vulnerability is not necessarily at odds with universal accounts of vulnerability. On the contrary, and as we have argued in Part I.B, this fits the concept's paradoxical nature: vulnerability is at once universal and particular. In fact, the Court tends to talk of "particularly vulnerable groups"⁵⁶ rather than just of "vulnerable groups." The inclusion of the term "particularly" underlines the idea that people belonging to these groups are simply "more" vulnerable than others. This points to the second characteristic of the Court's account of vulnerability: it is *particular*. By "particular," we mean that the Court's vulnerable subject is a group member whose vulnerability is shaped by specific group-based experiences.

A third characteristic of the Court's formulation of group vulnerability in the post-*Chapman* case law is its focus on *harm*. Indeed, all the indicators that the Court has employed to determine group vulnerability show that harm features centrally in the Court's account of group vulnerability. This is far from surprising since, as we have indicated in Part I.A, harm is central to most basic accounts of vulnerability. Thus, one clear set of indicators that emerges from the Court's case law is (historical) prejudice and stigmatization. These indicators point to the harm of *misrecognition*, which, according to Nancy Fraser, takes place when "institutionalized patterns of cultural value . . . constitute some actors as inferior, excluded, wholly other, or simply invisible—in other words, as less than full partners in social interaction . . ." ⁵⁷ As we will explain below, these indicators have played out in the Court's group-

⁵⁵ See *supra* Part I.B.

⁵⁶ See *Alajos Kiss v. Hungary*, App. No. 38832/06, 20 May 2010, ¶ 42; and *Kiyutin v. Russia*, App. No. 2700/10, 53 Eur. H.R. Rep. 26, ¶ 74 (2011).

⁵⁷ Nancy Fraser, *Rethinking Recognition*, 3 NEW LEFT REV. 107, 113 (2000).

vulnerability analysis, most notably in the context of discrimination. Most recently, the Court has started to delineate more complex indicators linked to social disadvantage and material deprivation in the context of Articles 3 and 8 ECHR. These indicators point to what Fraser calls *maldistribution*, which results “when some actors lack the necessary resources to interact with others as peers.”⁵⁸

In what follows, we organize our analysis of the vulnerable-group case law in two parts, depending on which of the two kinds of harm plays out more prominently in determining group vulnerability. This bifurcation of our examination of the Court’s case law does not mean that there are no connections between the two types of harm. What it means is that, though elements of misrecognition and maldistribution underlie all the cases, the Court’s assessment of group vulnerability tends to focus more on one than on the other, often leaving the links between the two unexplored..

ii. Prejudice and Stigmatization: Misrecognition Cases

The first set of indicators that has crucially informed the Court’s assessment of group vulnerability are prejudice and stigma. In the post-*Chapman* years, the Court has preserved the original designation of the Roma minority as “vulnerable” but with different connotations. Indeed, in cases concerning the discrimination of Roma students in education (Article 14 ECHR together with Article 2 of Protocol No. 1 of the Convention), the Court acknowledges the vulnerability of Roma against a different background: prejudices. These are the well-known school segregation cases: *D.H. and Others v. the Czech Republic* (2007), *Sampanis and Others v. Greece* (2008), and *Oršuš and Others v. Croatia* (2010).⁵⁹ In all these cases, the Court found that the Roma children were discriminated against in the enjoyment of the right to education. The Grand Chamber held in *D.H.*:

[A]s a result of their turbulent history and constant uprooting the Roma have become a specific type of disadvantaged and vulnerable minority.⁶⁰

The extensive reference in these judgments to Council of Europe documents reporting prejudices against Roma pupils in several parts of Europe indicates that such prejudices have informed the Court’s

⁵⁸ *Id.* at 116.

⁵⁹ *D.H. and Others v. the Czech Republic* (GC), App. No. 57325/00, 47 Eur. H. R. Rep. 3 (2007); *Sampanis and Others v. Greece*, App. No. 32526/05, 5 June 2008; and *Oršuš and Others v. Croatia* (GC), App. No. 15766/03, 52 Eur. H. R. Rep. 7 (2010).

⁶⁰ *D.H. and Others v. the Czech Republic* (GC), App. No. 57325/00, 47 Eur. H. R. Rep. 3, ¶182 (2007) (references omitted). See also *Oršuš and Others v. Croatia* (GC), App. No. 15766/03, 52 Eur. H. R. Rep. 7, ¶147 (2010).

understanding of Roma's vulnerability.⁶¹ Moreover, the factual background of some of these cases shows non-Roma parents' negative and hostile attitudes towards Roma children.⁶² Most recently, the Court has recognized prejudice more explicitly as a source of group vulnerability in *Horváth and Kiss v. Hungary*, a case concerning the placement of Roma children in special schools following the systematic misdiagnosis of mental disability.⁶³ The Court notes that many students were misdiagnosed because of their socio-economic disadvantage or cultural differences and acknowledges the "bias in past placement procedures."⁶⁴

The Court has also viewed negative social attitudes as the main source of vulnerability of Roma in *V.C. v. Slovakia* (2011), a case concerning the forced sterilization of a Roma woman.⁶⁵ The Court recognizes that forced sterilization has affected vulnerable individuals of different ethnic origins but admits that Roma are at particular risk "due, *inter alia*, to the widespread negative attitudes towards the relatively high birth rate among the Roma compared to other parts of the population, often expressed as worries of an increased proportion of the population living on social benefits."⁶⁶ The Court condemned Slovakia for not ensuring the applicant's free and informed consent to sterilization, finding violations of both Article 3 ECHR (degrading treatment) and Article 8 ECHR (respect for private and family life). However, and somewhat puzzlingly, despite linking the harmful practices it condemned to the widespread prejudice against Roma, the Court did not examine the applicant's discrimination complaint (Article 14 ECHR) separately.

The Court has similarly grounded its vulnerability assessment on (historical) prejudice – and, additionally, on the resulting social exclusion – in cases concerning other non-dominant groups. One example is *Alajos Kiss v. Hungary* (2010).⁶⁷ The case deals with the blanket disenfranchisement of people with mental disabilities in Hungary. The Court found a violation of the applicant's right to vote (Article 3 of Protocol 1 to the Convention). The Court's view of people with mental disabilities as a "particularly vulnerable group" rests on the considerable discrimination they have experienced in the past.⁶⁸ The group, the Court affirms, was "historically subject to prejudice with lasting consequences, resulting in

⁶¹ See, e.g., *D.H. and Others v. the Czech Republic* (GC), App. No. 57325/00, 47 Eur. H. R. Rep. 3, ¶ 54-80 (2007); and *Oršuš and Others v. Croatia* (GC), App. No. 15766/03, 52 Eur. H. R. Rep. 7, ¶ 65-86 (2010).

⁶² See, e.g., *Oršuš and Others v. Croatia* (GC), App. No. 15766/03, 52 Eur. H. R. Rep. 7, ¶ 154 and 204 (2010) and *Sampanis and Others v. Greece*, App. No. 32526/05, 5 June 2008, ¶ 18 and 19.

⁶³ *Horváth and Kiss v. Hungary*, App. No. 11146/11, 29 January 2013.

⁶⁴ *Id.* ¶ 116.

⁶⁵ *V.C. v. Slovakia*, App. No. 18968/07, 8 November 2011, ¶ 146.

⁶⁶ *Id.*

⁶⁷ *Alajos Kiss v. Hungary*, App. No. 38832/06, 20 May 2010.

⁶⁸ *Id.* ¶ 42.

their social exclusion.”⁶⁹ With this approach the Court takes the first steps towards embracing a “social model” of disability: this way of framing disability recognizes the built environment and society’s negative attitude towards people with impairment as the main factor disabling and excluding people.⁷⁰ Contrary to the “medical model” of disability, the hallmark of a social approach to disability emphasizes social prejudices and stereotypes, rather than individual impairments.⁷¹

The Court has continued along these lines with *Kiyutin v. Russia* (2011), another case concerning the indiscriminate exclusion of a group historically subject to prejudice.⁷² This time, the group in question is people living with HIV and the exclusion at issue the refusal of residence permit. The applicant, a man from Uzbekistan married to a Russian national with whom he had a daughter, was denied residence permit on the ground that he was HIV-positive. The Court found that the applicant was discriminated against in the enjoyment of his private and family life (Article 14 ECHR together with Article 8 ECHR). In the *Kiyutin* judgment, the Strasbourg Court refers to *Alajos Kiss* and explains in considerable detail how it came about that people living with HIV have suffered from widespread stigma and exclusion from the 1980s till the present. The Court therefore holds that “people living with HIV are a vulnerable group with a history of prejudice and stigmatization.”⁷³ The Court realizes that the basis for excluding HIV-positive non-nationals from obtaining residence permits was the general assumption that they would engage in unsafe behavior.⁷⁴ For the Court, such a generalization was not founded in facts and failed “to take into account the individual situation, such as that of the applicant”.⁷⁵

iii. Social Disadvantage and Material Deprivation: Maldistribution Cases

Two indicators of group vulnerability that are less clearly but not less importantly emerging in the Court’s case law are *social disadvantage* and *material deprivation*. In the cases that we will discuss now, what the Court ultimately addresses is the harm of maldistribution. The first case in point is *Yordanova v. Bulgaria* (2012), which concerned a planned mass eviction of Roma inhabitants from their decades-old settlement.⁷⁶ The applicants had built their homes on State land in Sofia without authorization. The

⁶⁹ *Id.*

⁷⁰ SANDRA FREDMAN, *DISCRIMINATION LAW* 172 (2nd ed. 2011).

⁷¹ Michael Ashley Stein, *Disability Human Rights*, 95 CAL. L. REV. 75, 86-87 (2007).

⁷² *Kiyutin v. Russia*, App. No. 2700/10, 53 Eur. H.R. Rep. 26 (2011).

⁷³ *Id.* ¶ 64.

⁷⁴ *Id.* ¶ 68.

⁷⁵ *Id.*

⁷⁶ *Yordanova v. Bulgaria*, App. No. 25446/06, 24 April 2012.

government, however, *de facto* tolerated the unlawful settlement for decades. It did not take any action until the matter became “urgent,” following neighbours complaints “about the Roma families’ behaviour.”⁷⁷ Indeed, neighbours had requested that the Roma inhabitants be removed and “returned to their native places,” holding them responsible for littering, stealing, drug abuse and aggressive behaviour.⁷⁸

The Court found a violation of the applicants’ right to respect for home, private and family life (Article 8 ECHR). In stopping the eviction that would have rendered the applicants homeless, the Court held that the Bulgarian State failed to recognize “the applicants’ situation as an outcast community and one of the socially disadvantaged groups.”⁷⁹ *Yordanova* differs from the other Roma cases previously discussed – school segregation and forced sterilization – in that the focus of the Court’s group vulnerability lies on poverty rather than on prejudice and discrimination. The Court holds for example that the authorities should have taken into account the disadvantaged position of the group to which the applicants belonged in assisting them with the eligibility for social housing.⁸⁰ Surprisingly, the Court does not explore the links between the group’s disadvantaged status (maldistribution) and the social prejudices against them (misrecognition), even though the facts of the case clearly show that prejudices played a role.⁸¹ The Court dismisses the applicants’ complaint of discrimination (Article 14 ECHR).⁸² Like in *V.C.*, and given the particular context of anti-Roma sentiment in which the removal was ordered, the Court should have at least acknowledged the role played by negative social views against Roma.

The case that has significantly broadened the Court’s notion of group vulnerability is *M.S.S. v. Belgium and Greece* (2011).⁸³ The applicant, an Afghan asylum seeker, was returned by Belgium to Greece under the “Dublin II Regulation” of the EU.⁸⁴ One of the main questions was whether the detention and living conditions of M.S.S in Greece amounted to inhuman and degrading treatment under Article 3 ECHR. In analyzing the applicant’s conditions of detention – more precisely, in examining the Greek government’s argument that the duration of his detention was insignificant – the Court observes:

⁷⁷ *Id.* ¶ 93.

⁷⁸ *Id.*

⁷⁹ *Id.* ¶ 129.

⁸⁰ *Id.* ¶ 132.

⁸¹ *Id.* ¶ 20, 21, 23, 45 and 46.

⁸² *Id.* ¶ 157-161.

⁸³ *M.S.S. v. Belgium and Greece*, App. No. 30696/09, 53 Eur. H.R. Rep. 2 (2011).

⁸⁴ Council Regulation 343/2003, O.J. (L 222) 3.

In the present case the Court must take into account that the applicant, being an asylum seeker, was particularly vulnerable because of everything he had been through during his migration and the traumatic experiences he was likely to have endured previously.⁸⁵

At first sight, this wording points to the specific experiences of the applicant. Thus, one might easily be under the impression that those individual experiences are paramount in the Court's vulnerability decision. In the next paragraph, however, the Court states the particular vulnerability of asylum seekers in a much more sweeping manner, as though it were an inherent attribute of the entire class. The Court holds: "[T]he applicant's distress was accentuated by the vulnerability inherent in his situation as an asylum seeker."⁸⁶

The Court's analysis of the applicant's living conditions is also marked by references to different aspects of asylum seekers' vulnerability. In this part of the reasoning, the Court states yet more sweepingly:

The Court attaches considerable importance to the applicant's status as an asylum seeker and, as such, a member of a particularly underprivileged and vulnerable population group in need of special protection.⁸⁷

In this passage, the Court refers to *Oršuš and Others v. Croatia*, a case that, as we have seen above, concerned the vulnerability of Roma in the context of school segregation. This may explain Judge Sajó's reaction in his separate opinion, arguing that, unlike other "particularly vulnerable groups" in the Court's case law, asylum seekers "are not a group historically subject to prejudice with lasting consequences, resulting in their social exclusion."⁸⁸ For him, the concept of vulnerable groups has a "specific meaning in the jurisprudence of the Court" and asylum seekers simply do not fit the concept.⁸⁹

Leaving aside that it is debatable whether asylum seekers have not suffered historically from prejudice, Judge Sajó's concern clearly points to the problem of the open-endedness of the vulnerable-

⁸⁵ M.S.S. v. Belgium and Greece, App. No. 30696/09, 53 Eur. H.R. Rep. 2, ¶ 232 (2011).

⁸⁶ *Id.* ¶ 233.

⁸⁷ *Id.* ¶ 251.

⁸⁸ M.S.S. v. Belgium and Greece, App. No. 30696/09, 53 Eur. H.R. Rep. 2 (2011) (Sajó J., partly concurring and partly dissenting, at 102).

⁸⁹ *Id.* at 101.

group concept.⁹⁰ Indeed, while Judge Sajó attempts to keep the vulnerable-group formulation limited to a narrowly defined set of factors,⁹¹ the majority opens up the meaning of the concept by relying on a series of other indicators.

For example, the majority finds M.S.S. particularly vulnerable because he was “wholly dependent on State support . . . unable to cater for his most basic needs.”⁹² The dependency argument rings familiar: it is taken from other Article 3 ECHR cases, concerning prisoners and detainees, although in this part of the *M.S.S.* judgment the Court reasons outside the context of detention or imprisonment.⁹³ Moreover, the majority realizes that the applicant’s situation exists on a large scale due to a series of institutional shortcomings inherent in the Greek asylum system.⁹⁴ These shortcomings included the lack of sufficient reception centers to accommodate asylum seekers; the administrative obstacles impeding their access to the job market; and the lengthy procedures to examine their asylum requests.⁹⁵ By unveiling all these deficiencies in the Greek asylum system, the Court is ultimately pointing to the institutional production of vulnerability of asylum seekers in Greece.

In sum, *M.S.S.* seems to show that the Court has deemed asylum seekers vulnerable on a series of interacting grounds, including: (i) the daily reality for asylum seekers in Greece; a reality that is characterized by material and psychological want; (ii) asylum seekers’ complete dependence on the State; (iii) an inherent vulnerability of asylum seekers due to everything they have been through during the process of migration and the trauma that often accompanies such migration; and (iv) the systemic deficiencies of the Greek asylum system. As a result, it is not quite clear whether *all* asylum seekers are to be considered vulnerable, or just the ones who arrive in Greece. What is clear, however, is that the Court’s analysis in *M.S.S.* challenges simplistic conceptions of group vulnerability, making room for more textured and complex formulations.

iv. *Blanks on the Map*

⁹⁰ We address the problems arising from the concept’s open-endedness in Part IV. *See infra* Part IV.

⁹¹ We critique this attempt as a misconceived form of essentialism. *See infra* Part II.C.

⁹² *M.S.S. v. Belgium and Greece*, App. No. 30696/09, 53 Eur. H.R. Rep. 2, ¶ 253-54.

⁹³ The Court routinely holds that prisoners and detainees are in a vulnerable position. *See, e.g.*, *Denis Vasilyev v. Russia*, App. No. 32704/04, 17 December 2009, ¶ 115 On the Court’s use of vulnerability in cases concerning prisoners, *see* Timmer, *supra* note 7.

⁹⁴ *M.S.S. v. Belgium and Greece*, App. No. 30696/09, 53 Eur. H.R. Rep. 2, ¶ 255 (2011).

⁹⁵ *Id.* ¶ 258-62.

In examining the Court's use of the term "vulnerable groups," we have narrowly followed the Court's own terminology. This focus on the Court's terminology has led us to discuss Roma, people with impaired health or abilities and asylum seekers, but not other groups who could reasonably be considered particularly vulnerable. Indeed, an examination of the Court's wider case law reveals some blanks or inconsistencies in the application of the notion of vulnerable groups. Using prejudice and stigmatization, dependency on the State, and social exclusion and disadvantage as indicators of vulnerability, there are more groups that – according to international human rights reports and scholarly literature – could have fallen within the notion of vulnerable groups.⁹⁶ Examples include national minorities,⁹⁷ religious minorities⁹⁸ and LGBT people.⁹⁹

More puzzlingly, sometimes the Court has been silent on group vulnerability in its case law concerning Roma applicants, notably in cases where the harm of misrecognition towards them is manifested in its most brutal form – namely in physical violence. In these cases, the Court overlooks the broader context of prejudice and discrimination within which vulnerability to violence originates.¹⁰⁰ *Aksu v. Turkey*, concerning the stereotyping of Roma in government-sponsored publications, is another example of the Court's failure to incorporate a vulnerable-group approach in its reasoning.¹⁰¹ The Court's Grand Chamber refers to the vulnerability of Roma, but this seems more a matter of lip service, as it carries no real weight in the Court's analysis of the case.¹⁰² What makes the Court's omission particularly puzzling is that at the heart of the case was precisely stereotyping and stigmatization of a particularly vulnerable group.

C) The Risks Inherent in the Concept of Vulnerable Groups

These blanks on the map do not represent the only concern we have with regards to the Court's increasing reliance on the vulnerable-group concept. The Court's account of group vulnerability also has

⁹⁶ A more general list of vulnerable groups is compiled by the Iceland Human Rights Centre. See Icelandic Human Rights Centre, *The Human Rights Protection of Vulnerable Groups*, <http://www.humanrights.is/the-human-rights-project/humanrightscasesandmaterials/humanrightsconceptsideasandfora/Undirflokkur/>. For an analysis on the problems that group-based approaches may entail, see *infra* Part II.C.

⁹⁷ Specifically relating to the Kurds in Turkey as a vulnerable national minority, see Lourdes Peroni, *Erasing Q, W and X, Erasing Cultural Differences*, in DIVERSITY AND EUROPEAN HUMAN RIGHTS, *supra* note 26, at 445.

⁹⁸ HAMMARBERG, *supra* note 48, at 36-43.

⁹⁹ *Id.* at 113-25.

¹⁰⁰ A case in point is *Eremiášová and Pechová v. the Czech Republic*, App. No. 23944/04, 16 February 2012.

¹⁰¹ *Aksu v. Turkey* (GC), App. Nos. 4149/04; 41029/04, 15 March 2012.

¹⁰² *Id.* ¶ 75.

more fundamental drawbacks. In what follows, we will show that the Court's reasoning risks reinforcing the vulnerability of certain groups by essentializing, stigmatizing, victimizing and paternalizing them.

i. Essentialism

In the first place, the Court's vulnerable-group reasoning is sometimes guilty of essentialism. Briefly put, essentializing means to reify one experience as paradigmatic, at the expense of other experiences.¹⁰³ In fact, the Court runs a *double-essentializing risk*. First, there is essentialism of the so-called vulnerable groups and the people belonging to these groups, i.e. Roma, asylum-seekers, and people with a disability. Essentializing vulnerable groups is harmful to the people from these groups. This occurs, for example, when "significant differences of location and concern" within one sub-group are obscured.¹⁰⁴ The lesson to be learned here is that, with its group-based approach, the Court should not overlook "the different kinds of vulnerabilities that individuals of the same subgroup may be susceptible to."¹⁰⁵ There have been cases wherein the Court did not seem to realize that it relied on a conception of a unitary vulnerable group. The Roma caravan cases come to mind. Marie-Bénédicte Dembour notes that the applicants in both *Buckley* and *Chapman* were women who were the principle caretakers of some of their family members.¹⁰⁶ Dembour points out that the Court failed to consider this in the respective majority judgments. The ways in which Roma mothers might be differently vulnerable are left unexplored and unrecognized in these judgments.

Essentialism of vulnerable groups also occurs when the Court "polices" the boundaries of a group.¹⁰⁷ A case in point is the little-known admissibility decision of *Horie v. the United Kingdom* (2011).¹⁰⁸ We have not discussed *Horie* so far because the Court forecloses actual group-vulnerability reasoning in the admissibility phase. And that is precisely the point. *Horie* concerns a New Traveller who

¹⁰³ See Vanessa E. Munro, *Resemblances of Identity: Ludwig Wittgenstein and Contemporary Feminist Legal Theory*, RES PUBLICA 137, 138 (2006). Essentialism is a complex concept, with several meanings, that has been used extensively in feminist and other critical analysis of law. Our discussion is case law oriented, rather than theoretical. Thorough theoretical discussions of the concept are provided by others. See, e.g., *id.*; and Anne Phillips, *What's wrong with Essentialism?*, 20 DISTINKTION: SCANDINAVIAN JOURNAL OF SOCIAL THEORY 47 (2010).

¹⁰⁴ Phillips, *supra* note 103, at 55.

¹⁰⁵ Solbakk, *supra* note 8, at 232.

¹⁰⁶ MARIE-BÉNÉDICTE DEMBOUR, WHO BELIEVES IN HUMAN RIGHTS? REFLECTIONS ON THE EUROPEAN CONVENTION 197-201 (2006).

¹⁰⁷ Anne Phillips defines this as the "treatment of certain characteristics as the defining ones for anyone in the category, as characteristics that cannot [be] questioned or modified without thereby undermining one's claim to belong to the group." Phillips, *supra* note 103, at 57.

¹⁰⁸ *Horie v. United Kingdom*, App. No. 31845/10, 1 February 2011.

had been pursuing a nomadic lifestyle for almost three decades. The Court observes that, unlike “Romani gypsies” and “Irish travelers,” “New Travellers live a nomadic lifestyle through personal choice and not on account of being born into any ethnic or cultural group.”¹⁰⁹ The Court implies that only those who are gypsies by birth, and not by choice, can be considered as belonging to a vulnerable group. In other words, the Court applies the immutability-criterion to police the boundaries of the (vulnerable) group of “gypsies”.¹¹⁰ Ms. Horie’s experiences end up getting no recognition.

The second type of essentialism is essentialism of the heuristic device itself: this kind concerns the question what is and is not allowed to fall under the vulnerable-group concept. Essentializing the heuristic device itself is harmful because it unduly limits the application of group-vulnerability reasoning. The clearest example of this kind of essentialism is found in the separate opinion of Judge Sajó in *M.S.S. v. Belgium and Greece*. As we noted in Part II.B, Judge Sajó’s attempts to keep the vulnerable-group formulation limited to a narrowly defined set of factors. This sort of essentialism threatens to create a competition among groups for recognition of their vulnerability.¹¹¹ Sure enough, we see this competition between groups reflected in Judge Sajó’s separate opinion:

In terms of vulnerability, dependence, and so on, the mentally disabled (and other vulnerable groups, whose members are subject to social prejudice) *are in a more difficult situation* than asylum seekers, who are not a homogeneous group subject to social categorisation and related discrimination.¹¹² (Emphasis added)

ii. Stigmatization

In *Kiyutin v. Russia*, the stigmatization of people living with HIV is central to the Court’s finding that they constitute a vulnerable group.¹¹³ Paradoxically, however, the Court itself risks stigmatizing vulnerable groups, by applying the very term “vulnerable,” which – as was discussed in Part I – for many people

¹⁰⁹ *Id.* ¶ 28.

¹¹⁰ Many commentators have critiqued the use of the immutability-criterion in discrimination law; see, e.g., FREDMAN, *supra* note 70, at 131-34; and Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of “Don’t Ask, Don’t Tell,”* 108 YALE L. J. 485 (1998).

¹¹¹ This is an important reason why Martha Fineman disapproves of group-language in her vulnerability theory. Fineman, *supra* note 18, at 253-54.

¹¹² *M.S.S. v. Belgium and Greece*, App. No. 30696/09, 53 Eur. H.R. Rep. 2 (2011) (Sajó J., partly concurring and partly dissenting, at 104). We note that Judge Sajó’s reference to homogeneity is also a form of essentialism: no group is homogeneous, individuals within a group are always positioned differently.

¹¹³ *Kiyutin v. Russia*, App. No. 2700/10, 53 Eur. H.R. Rep. 26, ¶ 64 (2011).

carries solely negative associations such as harm and injury. The Court should be weary of stigmatization, especially as it is possible that vulnerability can take on a “master status.” This occurs when “the defining attribute eclipses all other aspects of stigmatized persons, their talents and abilities.”¹¹⁴ When vulnerability overshadows all other aspects of an applicant’s identity in the Court’s reasoning, it has taken on a master status.¹¹⁵

iii. Paternalism: Denying Agency and Imposing Protection

Lastly, the Court on occasion engages in misplaced paternalism with its group-vulnerability reasoning. In *D.H.*, in response to the government’s objection that the Roma children would not have been placed in special schools had their parents not consented to it, the majority of the Grand Chamber held:

In the circumstances of the present case, the Court is not satisfied that the parents of the Roma children, who were members of a disadvantaged community and often poorly educated, were capable of weighing up all the aspects of the situation and the consequences of giving their consent.¹¹⁶

In a passionate dissent, Judge Borrego Borrego denounced this denial of the ability of Roma parents to make informed decisions regarding the education of their children.¹¹⁷ By denying the Roma parents’ capacity to make an informed decision about placing their children in special schools, the Court seems to reinforce their powerlessness. The Court should have confined itself to noting that meaningful consent is problematic in the specific context of the case.

The Court does much better in assessing the particular circumstances of the case in *V.C. v. Slovakia*, concerning the forced sterilization of a Roma woman. The Court even roundly condemns the paternalistic behaviour of the hospital staff in performing the sterilization-procedure on V.C., without

¹¹⁴ R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 78 N.Y.U. L. REV. 803, 819 n.63 (2004) (citations omitted).

¹¹⁵ Cf. Zachary A. Kramer, *Of Meat and Manhood*, 89 WASH. U. L. REV. 287, 304-05 (2011).

¹¹⁶ *D.H. and Others v. the Czech Republic* (GC), App. No. 57325/00, 47 Eur. H. R. Rep. 3, ¶ 203 (2007). Similarly *Sampanis and Others v. Greece*, App. No. 32526/05, 5 June 2008, ¶ 94; and *Oršuš and Others v. Croatia* (GC), App. No. 15766/03, 52 Eur. H. R. Rep. 7, ¶ 178-179 (2010).

¹¹⁷ Among other things, the Judge cautioned against “certain “well-intentioned” people [who] feel constrained to impose their conception of life on all.” *D.H. and Others v. the Czech Republic* (GC), App. No. 57325/00, 47 Eur. H. R. Rep. 3, ¶ 15 (2007) (Borrego Borrego J., dissenting).

first obtaining her informed consent.¹¹⁸ The Court notes that “in similar situations informed consent was required, promoting autonomy of moral choice for patients,”¹¹⁹ and it emphasises the need to respect a person’s dignity and integrity.¹²⁰ This kind of language is much more empowering than the language used by the majority in *D.H.*

iv. *Ways of Lessening these Risks*

In our opinion it is not problematic that the Court pays increased attention to group vulnerability, provided that the Court ensures that (i) it is specific about *why* it considers that *group* particularly vulnerable and (ii) it demonstrates *why* that makes the *particular applicant* more prone to certain types of harm or why the applicant should be considered and treated as a vulnerable member of that group in the instant case. The test should therefore entail two interrelated levels of inquiry: collective and individual. Otherwise, the Court may end up essentializing vulnerable groups and stereotyping the individuals from these groups; thereby reinforcing their vulnerability rather than lessening it. Besides, our suggestion has the advantage that the Court does not lay itself open to the charge that it delivers judgments on the situation of particular groups in general, rather than on the facts of the case.¹²¹

Moreover, in order to prevent group-vulnerability reasoning from reducing applicants to pure victims and from stigmatizing their vulnerability, the Court should, firstly, always make sure that it does not apply vulnerability as simply a “label” (a label easily turns into a stigma), but as a “layered” concept.¹²² The focus should be on the various circumstances that *render* certain groups vulnerable, not on which groups *are* vulnerable.¹²³ The Court should insist on and strengthen its contextual inquiry to determine whether a group may be deemed vulnerable or not. This approach will help avoiding a reified conception of group vulnerability, as the focus is expanded towards the social and historical forces that originate, maintain, or reinforce the vulnerability of a group.¹²⁴

¹¹⁸ V.C. v. Slovakia, App. No. 18968/07, 8 November 2011, ¶ 114.

¹¹⁹ *Id.*

¹²⁰ *Id.* ¶ 115.

¹²¹ This criticism was leveled at the majority of the Court by the dissenters in *Oršuš*. See *Oršuš and Others v. Croatia* (GC), App. No. 15766/03, 52 Eur. H. R. Rep. 7 (2010) (Jungwiert, Vajić, Kovler, Gyulumyan, Jaeger, Myjer, Berro-Lefèvre and Vučinić J. partly dissenting, ¶ 15).

¹²² These metaphors are taken from Luna, *supra* note 26.

¹²³ *Id.* at 129.

¹²⁴ Cf. Kathryn Abrams, “Groups” and the Advent of Critical Race Scholarship, 1 ISSUES IN LEGAL SCHOLARSHIP 1, 5 (2003) (describing group disadvantage as not simply “an empirical fact” but as “a circumstance that emerged from a sequence of historical events or a pattern of oppressive treatment.”).

All of this is to say that the Court should beware of the temptation to turn group-vulnerability into an easy and straightforward narrative: people are rendered particularly vulnerable due to a complex set of causes (ranging from economic disempowerment, to social attitudes, and physical limitations). Moreover, people always possess sources of *resilience* in the face of their vulnerabilities.¹²⁵ The Court should not trivialize the abilities of persons who belong to an otherwise vulnerable group. So for example, in his separate opinion in *M.S.S.*, Judge Sajó points out that the applicant “had money and speaks English.”¹²⁶ In our view Judge Sajó is right to point out these sources of resilience of the applicant (even if we do not agree with all he says in his separate opinion). Portraying applicants as purely vulnerable will disempower them.

IV. The Effect of the Vulnerable-Group Concept in the Court’s Case Law: Substantive Equality

In spite of the perils that group vulnerability may carry in practice, we still believe that the emergence of the concept has had positive implications in the Court’s case law. Our overall judgment, therefore, is that emphasis on group vulnerability is a welcome development. In particular, its insertion represents a crucial step towards an enhanced antidiscrimination case law and a more robust idea of equality.¹²⁷ The Court’s use of the term “vulnerable groups” is therefore not mere rhetorical flourish. The term *does* something: it addresses and redresses different aspects of inequality in a more substantive manner.

Using Sandra Fredman’s multi-dimensional characterization of substantive equality, we argue that the Court’s insertion of the notion of vulnerable groups has addressed substantive equality’s four chief aims: participation, transformation, redistribution, and recognition.¹²⁸ The *participative* dimension of substantive equality, Fredman argues, requires compensating for the “absence of political voice” and

¹²⁵ See, e.g., Fineman, *supra* note 21.

¹²⁶ *M.S.S. v. Belgium and Greece*, App. No. 30696/09, 53 Eur. H.R. Rep. 2 (2011) (Sajó J., partly concurring and partly dissenting, at 106 n.1).

¹²⁷ On other developments within Article 14 ECHR case law that connote a more substantive conception of equality and a more proactive role of the Court in the area, see, e.g., Carmelo Danisi, *How Far Can the European Court of Human Rights Go in the Fight Against Discrimination? Defining New Standards in Its Nondiscrimination Jurisprudence*, 9 INT’L J. OF CONST. L. 793 (2011); Rory O’Connell, *Cinderella Comes to the Ball: Article 14 and the Right to Non-discrimination in the ECHR*, 29 LEGAL STUDIES 211 (2009); and Alexandra Timmer, *Toward an Anti-Stereotyping Approach for the European Court of Human Rights*, 11 HUM. RTS. L. REV. 707 (2011).

¹²⁸ FREDMAN, *supra* note 70, at 25-33.

opening up “channels for greater participation in the future.”¹²⁹ Participation, as she explains, is a “multi-layered concept,” which entails not only political participation but also “taking part in decisions in a wide range of situations affecting individuals or groups, including at the workplace, in education, in health care, and in community organization.”¹³⁰ The *transformative* dimension seeks to accommodate group differences; the point is to remove “the detriment which is attached to difference,” rather than difference itself.¹³¹ The *redistributive* aspect of substantive equality, in turn, aims at “breaking the cycle of disadvantage,” which encompasses, among other things, “the maldistribution of resources.”¹³² Last, substantive equality’s *recognition* facet seeks to “promote respect for dignity and worth, thereby redressing stigma, stereotyping, humiliation and violence because of membership of an identity group.”¹³³

The capacity of the vulnerable-group concept to address the multiple dimensions of substantive equality lies primarily in its *particular* nature.¹³⁴ The Court’s particularized understanding of vulnerability explained in Part II.B – that is, of vulnerability as shaped by specific group-based experiences of prejudice, stigma and social disadvantage – introduces an asymmetrical approach in the analysis of equality. The notion of asymmetry, essential to substantive equality, implies that not all differentiations are problematic but only those that affect groups suffering disadvantage, prejudice and stereotyping.¹³⁵ Thus, as Sandra Fredman notes, “instead of aiming to treat everyone alike, regardless of status, substantive equality focuses on the group which has suffered disadvantage.”¹³⁶ In practice, this means

¹²⁹ *Id.* at 31.

¹³⁰ SANDRA FREDMAN, *HUMAN RIGHTS TRANSFORMED: POSITIVE RIGHTS AND POSITIVE DUTIES* 180 (2008).

¹³¹ FREDMAN, *supra* note 70, at 30.

¹³² *Id.* at 26.

¹³³ *Id.* at 25 and 28-30.

¹³⁴ The relational character of the Court’s notion of group vulnerability also serves to advance substantive equality. Indeed, and as we have shown in Part II.B, this feature has enabled the Court to inquire into the broader societal and institutional structures that create or reinforce applicants’ vulnerabilities. This relational understanding of group vulnerability is in line with one fundamental premise of substantive equality: discrimination and inequalities are not the exclusive or concrete fault of one or various individuals, but the result of societal and institutional structures more broadly. *See, e.g.,* Alan David Freeman, *Legitimizing Racial Discrimination through Antidiscrimination Law: A Critical Overview of the Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978). In this Part, we focus however on the implications that the *particular* nature of group vulnerability has carried in the Court’s case law, as this aspect has brought more concrete doctrinal consequences.

¹³⁵ Saras Jagwanth, *Expanding Equality*, ACTA JURIDICA 131,133 (2005).

¹³⁶ FREDMAN, *supra* note 70, at 26.

that substantive equality focuses on women rather than men, ethnic minorities rather than ethnic majorities, sexual minorities rather than heterosexuals.¹³⁷

In the next pages, we discuss three different ways in which the asymmetry implicit in the Court's vulnerable-group approach has manifested itself: (i) the positive obligations resting on the State become more pronounced under Article 2 of Protocol 1 (in conjunction with Article 14 ECHR), Article 3 ECHR and Article 8 ECHR; (ii) the harm inflicted on the applicant weighs more heavily in Article 3 ECHR scope analysis and in Article 8 ECHR proportionality analysis; and (iii) the margin of appreciation in Article 14 ECHR direct discrimination cases is narrowed.

A) Special Positive Obligations: Article 3 ECHR, Article 8 ECHR, and Article 2 of Protocol 1 (in conjunction with Article 14 ECHR)

Substantive equality does not confine itself to a duty to refrain from discrimination.¹³⁸ Substantive equality involves more than that; it requires the State to take a proactive role and to adopt positive steps to promote equality.¹³⁹ The case law examined below shows that the Court has embraced several aspects of substantive equality by establishing positive obligations towards vulnerable groups in both the context of Article 14 ECHR and of freestanding Convention rights (e.g., Articles 8 and 3 ECHR), which may not associate themselves with equality-based reasoning as easily as Article 14 ECHR.

Moreover, the Court's recognition of positive obligations towards members of particularly vulnerable groups has often involved "special consideration to" or "special protection of" their "specificities" and "needs."¹⁴⁰ This kind of reasoning reflects the asymmetry that characterizes substantive equality: when it comes to the most vulnerable, States are obliged to provide a level of protection that is more responsive or tailored to their particular needs and concerns. Though group vulnerability has played an instrumental role in deriving these positive obligations, it would not do to overstate the weight the Court attaches to it. The vulnerability of the group in question is always one of

¹³⁷ Titia Loenen, *Indirect Discrimination: Oscillating between Containment and Revolution*, in NON-DISCRIMINATION LAW: COMPARATIVE PERSPECTIVES 205-06 (Titia Loenen & Peter R. Rodrigues eds., 1999). *See also*, FREDMAN, *supra* note 70, at 26.

¹³⁸ *See generally* FREDMAN, *supra* note 130, at 175-180.

¹³⁹ *Id.*

¹⁴⁰ *See, e.g.*, Chapman v. United Kingdom (GC), 2001-I; 33 Eur. H.R. Rep. 18, ¶ 96 (2001); M.S.S. v. Belgium and Greece, App. No. 30696/09, 53 Eur. H.R. Rep. 2, ¶ 251 (2011); and Yordanova v. Bulgaria, App. No. 25446/06, 24 April 2012, ¶ 128 and 129.

a constellation of factors that the Court takes into account in its decisions to establish positive obligations.

The Court has, first of all, furthered the participative dimension of substantive equality. This has taken place in the context of Article 8 ECHR. Starting with the so-called caravan-cases, the Court has held that because Roma are vulnerable, States are to a certain extent under the obligation to facilitate their lifestyle.¹⁴¹ The positive obligation to facilitate a Roma lifestyle in *Chapman* and its sister cases¹⁴² does not require enabling (Roma) minority members to live according to their culture, which in these cases would have meant making available sufficient caravan sites.¹⁴³ The positive obligation is procedural; it requires that State authorities show they have taken into account the Roma's cultural situation both in policy-making and judicial interpretation.¹⁴⁴ This kind of positive duty offers redress for the vulnerability of minorities whose concerns are most likely to be ignored in legislative, policy and administrative decision-making processes. In addition, *Chapman* and its sister cases take a significant step in the direction of transformative substantive equality (accommodation of differences) by recognizing a "positive obligation . . . to facilitate the Gypsy way of life."¹⁴⁵ To be sure, the judgments in these cases ultimately fall short of achieving transformative equality because the Court did not actually require the United Kingdom to accommodate traveling people, but the potential is there.

In *V.C.*, though the positive duty derived from Article 8 ECHR takes a different form and character than in *Chapman*, the Court similarly furthers the participative aspect of equality. This time, the aim is to secure the applicant's involvement in a procedure that concerns her reproductive health. Indeed, the Court realizes that this process did not involve the applicant "to a degree permitting her interests to be effectively protected."¹⁴⁶ As a result, the Court demands that the State put in place "safeguards to protect the reproductive health of, in particular, women of Roma origin," enabling the applicant, "as a member of the vulnerable Roma community, to effectively enjoy her right to respect for

¹⁴¹ *Chapman v. United Kingdom* (GC), 2001-I; 33 Eur. H.R. Rep. 18, ¶ 96 (2001). See also *Connors v. United Kingdom*, App. No. 66746/01, 40 Eur. H.R. Rep. 189, ¶ 84 (2004).

¹⁴² Four similar other cases were decided the same day as *Chapman*. See *Smith v. United Kingdom*, App. No. 25154/94, 33 Eur. H.R. Rep. 712, 740 (2001); *Lee v. United Kingdom*, App. No. 25289/94, 33 Eur. H.R. Rep. 677, 702 (2001); *Coster v. United Kingdom*, 33 Eur. Ct. H.R. 479, 506 (2001) and *Beard v. United Kingdom*, App. No. 24882/94, 33 Eur. H.R. Rep. 442, 470 (2001) (all from January 18 2001).

¹⁴³ Eva Brems, *Human Rights as a Framework for Negotiating/Protecting Cultural Differences: An Exploration of the Case-law of the European Court of Human Rights*, in *CULTURAL DIVERSITY AND THE LAW: STATE RESPONSES FROM AROUND THE WORLD* 663, 673 (Marie-Claire Foblets, Jean-François Gaudreault-Desbiens & Alison Dundes Renteln eds., 2010).

¹⁴⁴ *Id.* at 674.

¹⁴⁵ *Chapman v. United Kingdom* (GC), 2001-I; 33 Eur. H.R. Rep. 18, ¶ 96 (2001).

¹⁴⁶ *V.C. v. Slovakia*, App. No. 18968/07, 8 November 2011, ¶ 151.

her private and family life.”¹⁴⁷ The safeguards the Court has in mind are those aimed at ensuring Roma women’s full and informed consent in procedures that concern their reproductive health.

The Court has also furthered the redistributive aspect of substantive equality in the contexts of Articles 8 and 3 ECHR as a result of the socio-economic nature of the positive duty imposed on the State. The examples are *Yordanova* and *M.S.S.* Though decided against different backdrops, both cases raise issues of homelessness. In *Yordanova* – the case concerning an attempt to remove a Roma community from unlawfully occupied State land – the applicants would have become homeless as a result of the State’s action. In *M.S.S.*, on the other hand, the applicant asylum seeker was actually rendered homeless as a result of the State’s inaction.

The Court reaffirms in both cases that neither Article 3 ECHR nor Article 8 ECHR can be interpreted as giving rise to a duty to provide housing.¹⁴⁸ In *M.S.S.*, moreover, the Court says that Article 3 ECHR does not entail an obligation to give refugees financial assistance.¹⁴⁹ Notwithstanding the Court’s caveats, the obligations affirmed in the two cases contain socio-economic elements. The Court states in *Yordanova*: “[A]n obligation to secure shelter to particularly vulnerable individuals may flow from Article 8 in exceptional cases.”¹⁵⁰ What exactly the Court means by “exceptional cases” is not clear from the judgment. In the context of *Yordanova*, the scope of the positive obligation to provide shelter seems to be tied to the negative obligation not to arbitrarily remove vulnerable individuals from their homes. So, if States plan to evict members of a vulnerable group from their unlawful settlement, they should first consider whether the eviction would render them homeless. In fact, the Court makes clear that the risk of rendering the applicants homeless was not “irrelevant,” as the government had claimed.¹⁵¹

M.S.S., on the other side, is the first case in which the Court has found a violation of Article 3 ECHR on the grounds of extreme material poverty for which it held a State responsible.¹⁵² The majority held:

¹⁴⁷ *Id.* ¶154 and 179.

¹⁴⁸ *Yordanova v. Bulgaria*, App. No. 25446/06, 24 April 2012, ¶ 130; and *M.S.S. v. Belgium and Greece*, App. No. 30696/09, 53 Eur. H.R. Rep. 2, ¶ 249 (2011).

¹⁴⁹ *M.S.S. v. Belgium and Greece*, App. No. 30696/09, 53 Eur. H.R. Rep. 2, ¶ 249 (2011).

¹⁵⁰ *Yordanova v. Bulgaria*, App. No. 25446/06, 24 April 2012, ¶ 130.

¹⁵¹ *Id.* ¶ 126.

¹⁵² In a complaint that was ruled inadmissible, prior to the judgment of *M.S.S.*, the Court had already held that “inhuman or degrading treatment” can occur when “an applicant, in circumstances wholly dependent on State support, found herself faced with official indifference when in a situation of serious deprivation or want incompatible with human dignity.” *Budina v. Russia*, App. No. 45603/05, 18 June 2009; similar reasoning is in *Larioshina v. Russia*, App. No. 56869/00, 23 April 2002.

[T]he Court considers that the Greek authorities have not had due regard to the applicant's vulnerability as an asylum seeker and must be held responsible, because of their inaction, for the situation in which he has found himself for several months, living in the street, with no resources or access to sanitary facilities, and without any means of providing for his essential needs.¹⁵³

This reasoning establishes that it is not only in a context of imprisonment¹⁵⁴ that an applicant's vulnerability can be an argument for deriving positive obligations in the social and economic sphere from the civil and political right encapsulated in Article 3 ECHR. Though the applicant's status as a member of a particularly vulnerable group carries "considerable importance" in the Court's decision to derive such positive obligations,¹⁵⁵ this is not the only factor the Court relies on. Another factor that carries much weight is the existence of the EU Reception Directive incorporated into Greek domestic law,¹⁵⁶ which lays down minimal rules as to the material conditions to which asylum seekers are entitled.¹⁵⁷

Last, the Court has advanced the recognition and redistribution aspects of substantive equality in the context of education of Roma children (Article 2 of Protocol 1, in conjunction with Article 14 ECHR). It has furthered recognition by imposing on the State positive obligations "to avoid the perpetuation of past discrimination."¹⁵⁸ It has fostered redistribution by requiring the State to put in place safeguards guaranteeing that Roma children do not end up in a system of inferior education.¹⁵⁹ In *D.H. and Oršuš*, the positive obligation that the Court demanded from the States was in essence procedural. For example, in *Oršuš* the Court speaks of the obligation to put in place "safeguards that would ensure that . . . the State had sufficient regard to [Roma children's] special needs as members of a disadvantaged group".¹⁶⁰ However, in *Horváth and Kiss*, the Court seems to go a step further by demanding from the State a more substantive and far-reaching positive obligation: "to undo a history of

¹⁵³ *M.S.S. v. Belgium and Greece*, App. No. 30696/09, 53 Eur. H.R. Rep. 2, ¶ 263 (2011).

¹⁵⁴ The Court regularly recognizes that the prisoners with (mental) health problems are vulnerable and that the State is under a duty to provide appropriate (health) care for them. *See, e.g.*, *G. v. France*, App. No. 27244/09, 23 February 2012, ¶ 72 and 77.

¹⁵⁵ *M.S.S. v. Belgium and Greece*, App. No. 30696/09, 53 Eur. H.R. Rep. 2, ¶ 251 (2011).

¹⁵⁶ Council Directive 2003/9, 2003 O.J. (L 31) 18 (EC).

¹⁵⁷ *M.S.S. v. Belgium and Greece*, App. No. 30696/09, 53 Eur. H.R. Rep. 2, ¶ 250 (2011).

¹⁵⁸ *Horváth and Kiss v. Hungary*, App. No. 11146/11, 29 January 2013, ¶ 116.

¹⁵⁹ In practice, the lack of appropriate safeguards resulted in the placement of Roma children in special schools with a more basic curriculum, which ultimately compromised Roma students' education and future job opportunities. *See, e.g.*, *D.H. and Others v. the Czech Republic* (GC), App. No. 57325/00, 47 Eur. H. R. Rep. 3, ¶ 207 (2007).

¹⁶⁰ *Oršuš and Others v. Croatia* (GC), App. No. 15766/03, 52 Eur. H. R. Rep. 7, ¶ 183 (2010).

racial segregation in special schools.”¹⁶¹ Moreover, in *Horváth and Kiss*, the Court addresses the redistributive concerns by acknowledging that, as a result of their misplacement in special schools, Roma children are “unlikely to break out of [the] system of inferior education, resulting in their lower educational achievement and poorer prospects of employment.”¹⁶²

B) Increased Weight of Harm in the Scope and Proportionality Analyses: Articles 3 and 8 ECHR

Group vulnerability has introduced an asymmetrical approach in the Court’s Article 3 ECHR scope analysis and Article 8 ECHR proportionality.¹⁶³ This approach entails that the ill treatment inflicted on the applicant may take a greater dimension if she or he belongs to a particularly vulnerable group. This is illustrated in *M.S.S.* In this case, the vulnerability of the applicant as an asylum seeker plays a role in the Court’s decision of whether his conditions of detention reached the “minimum level of severity” to fall within the scope of Article 3 ECHR. Indeed, in determining whether the duration of the applicant’s detention was significant – the Greek government had argued that it was brief – the Court says:

[The Court] does not regard the duration of the two periods of detention imposed on the applicant – four days in June 2009 and a week in August 2009 – as being insignificant. In the present case, the Court must take into account that the applicant, being an asylum seeker, was particularly vulnerable because of everything he had been through during his migration and the traumatic experiences he was likely to have endured previously.¹⁶⁴

So here, because of the applicant’s vulnerable status as an asylum seeker, the effects of his detention take a dimension that they would have not taken if the case had concerned a less vulnerable applicant. As Judge Sajó rightly puts it in his separate opinion: “For the Court the duration of the detention in the present case is comparable in its effects to much longer stays in detention because of the assumed vulnerability of the applicant.”¹⁶⁵ Group vulnerability therefore acts as a magnifying glass: the ill treatment caused to the applicant looks bigger through the vulnerability lens.

¹⁶¹ *Horváth and Kiss v. Hungary*, App. No. 11146/11, 29 January 2013, ¶ 127.

¹⁶² *Id.* ¶ 115.

¹⁶³ See also Timmer, *supra* note 7.

¹⁶⁴ *M.S.S. v. Belgium and Greece*, App. No. 30696/09, 53 Eur. H.R. Rep. 2, ¶ 232 (2011).

¹⁶⁵ *Id.* (Sajó J., partly concurring and partly dissenting, at 101).

Yordanova, on the other side, is an example of the role group vulnerability may play in Article 8 ECHR proportionality analysis. The Court states:

In the context of Article 8, in cases such as the present one, the applicants' specificity as a social group and their needs must be one of the relevant factors in the proportionality assessment that the national authorities are under a duty to undertake.¹⁶⁶

The Court does not indicate the precise weight that national authorities should attach to the applicants' disadvantaged status. However, it makes clear that when governments do not show that they have considered the specificities and needs of particularly vulnerable groups, they will not be able to pass the ECHR proportionality analysis. In other words, attention to vulnerability takes the form of a procedural requirement.¹⁶⁷ As we have pointed out in Part II.A, the Court did not follow this approach in *Chapman*, since vulnerability played no real role in the proportionality analysis in that case.

It goes without saying that the inclusion of group vulnerability in the proportionality does not guarantee a favorable outcome to the vulnerable applicant; vulnerability enters the balance along with a host of other factors. Its inclusion may nonetheless increase the applicant's chances of obtaining protection. The idea underlying this argument is that the Court should give the interests of vulnerable individuals and groups *more* weight in the proportionality because they are likely to experience harm *more acutely*. Ultimately, by thus giving weight to group vulnerability in the proportionality analysis, the Court furthers substantive equality. Fredman has argued that "substantive equality focuses on the group which has suffered disadvantage" with the aim of breaking that cycle of disadvantage.¹⁶⁸ In our view, the Court takes the first step towards breaking the cycle of disadvantage by recognizing disadvantage (in the form of historically developed vulnerabilities) as a relevant factor in the proportionality analysis.

C) Narrowed Margin of Appreciation: Article 14 ECHR

The last way in which the concept of vulnerable groups has introduced an asymmetrical interpretation of the Convention, is by narrowing the margin of appreciation in Article 14 cases. A few times now, the

¹⁶⁶ *Yordanova v. Bulgaria*, App. No. 25446/06, 24 April 2012, ¶ 129.

¹⁶⁷ *Timmer*, *supra* note 7.

¹⁶⁸ FREDMAN, *supra* note 70, at 26.

Court has applied strict scrutiny in cases that concerned discrimination of vulnerable groups. This approach is of recent date; the two seminal cases are *Alajos Kiss* (2010) and *Kiyutin* (2011). Both cases, as we have seen in Part II.B, concern the direct and outright exclusion of an entire class of individuals from the enjoyment of a right.

In *Kiyutin*, the case concerning an indiscriminate refusal of residence permit to those living with HIV, the Court observes:

If a restriction on fundamental rights applies to a particularly vulnerable group in society that has suffered considerable discrimination in the past, then the State's margin of appreciation is substantially narrower and it must have *very weighty reasons* for the restrictions in question. The reason for this approach, which questions certain classifications *per se*, is that such groups were historically subject to prejudice with lasting consequences, resulting in their social exclusion. Such prejudice could entail legislative stereotyping which prohibited the individualised evaluation of their capacities and needs.¹⁶⁹ (Emphasis added)

This line of reasoning was in fact first used in *Alajos Kiss v. Hungary*, which actually concerns the right to vote (Article 3 Protocol 1), not Article 14 ECHR.¹⁷⁰ Despite the fact that the Court does not explicitly examine Article 14, however, its analysis in *Alajos Kiss* is really about discrimination. The Court states:

The Court further considers that the treatment as a single class of those with intellectual or mental disabilities is a questionable classification, and the curtailment of their rights must be subject to *strict scrutiny*.¹⁷¹ (Emphasis added)

Thus, in both *Alajos Kiss* and *Kiyutin*, the Court indicates that it will scrutinize national authorities' decisions strictly when they limit the rights of members of particularly vulnerable groups. As a result, States have to put forward "very weighty reasons" for the Court to accept the justification as objective and reasonable. Since neither Russia nor Hungary gave such reasons, the Court concluded that they "overstepped the narrow margin of appreciation afforded to them."¹⁷²

¹⁶⁹ *Kiyutin v. Russia*, App. No. 2700/10, 53 Eur. H.R. Rep. 26, ¶ 63 (2011).

¹⁷⁰ *Alajos Kiss v. Hungary*, App. No. 38832/06, 20 May 2010, ¶ 42.

¹⁷¹ *Id.* ¶ 44.

¹⁷² *Kiyutin v. Russia*, App. No. 2700/10, 53 Eur. H.R. Rep. 26, ¶ 74 (2011).

This approach is noteworthy for a number of reasons. In the first place, it marks a willingness of the Court to explain why certain classifications are particularly problematic. In the past, the Court has seldom taken the trouble to explain why certain grounds of distinction are problematic, except to note a consensus on the topic.¹⁷³ Distinctions on the ground of sex, for example, require very weighty reasons because “the advancement of the equality of the sexes is today a major goal in the member States of the Council of Europe.”¹⁷⁴ With the type of reasoning issued in *Alajos Kiss* and *Kiyutin*, on the other hand, the Court takes exceptional care to acknowledge the wrongs of discrimination and clarify the rationale for a narrowed margin of appreciation.¹⁷⁵

Secondly, this reasoning provides a highly principled approach to justifications, since certain classifications are deemed suspect “*per se*.” Distinctions are inherently suspect when they concern groups of people that have been historically discriminated against; such distinctions run a high risk of being based on stereotypes rather than on “rational” grounds.¹⁷⁶ The Court acknowledges that past discrimination reverberates in the present and contaminates actions and decisions. This highly context-sensitive approach – which is an expression of the relational character of the Court’s vulnerable-group concept – heralds a substantive (rather than purely formal) conception of equality. Moreover, by narrowing the margin of appreciation, the Court more carefully scrutinizes the possible misrecognition harms of prejudice, stigma and stereotyping, therein advancing the recognition aspect of substantive equality.

However, neither in *Alajos Kiss* nor in *Kiyutin* does group vulnerability in and of itself narrow the margin of appreciation. As we have noted above, both cases concern direct exclusions of entire groups from the enjoyment of a right. The particular nature of the restrictions in question – direct and absolute – may further explain the Court’s willingness to reduce States’ margin of appreciation. Indeed, the Court states in *Alajos Kiss*: “The Court cannot accept, however, that an absolute bar on voting by any person under partial guardianship, irrespective of his or her actual faculties, falls within an acceptable margin of

¹⁷³ J. H. Gerards & H.-M.Th.D. ten Napel, *De “grondwetsherziening van Martijn” revisited: over kiesrecht en het verbod van discriminatie op grond van handicap*, 35 NTM-NJCM BULLETIN 1106, ¶ 3 (2010) (Neth).

¹⁷⁴ *Abdulaziz, Cabales, and Balkandali v. United Kingdom* A 94 (1985); 7 Eur. H.R. Rep. 471, ¶ 78.

¹⁷⁵ This clarification is especially welcome given the considerable amount of confusion that exists concerning the Court’s use of the margin of appreciation doctrine. See generally, e.g., George Letsas, *Two Concepts of the Margin of Appreciation*, 26 OXFORD J. OF LEGAL STUD. 705 (2006).

¹⁷⁶ For more discussion on the wrongs of stereotyping in the context of the Strasbourg Court’s case law, see Timmer, *supra* note 127.

appreciation.”¹⁷⁷ In *Kiyutin*, moreover, the Court additionally relies on the consensus to narrow the State’s margin of appreciation.¹⁷⁸

As regards the other cases that we have examined in this Article, there the relationship between the margin of appreciation and group vulnerability is less clear. In fact, in the other cases, the role of the margin of appreciation principle is not very prominent. In *M.S.S.*, first of all, the principle is obviously absent (it has no role in Article 3 ECHR cases given the absolute character of this provision). In *V.C.* the principle is not explicitly mentioned at all; and in *D.H.*, *Oršuš*, and *Yordanova* the Court is ultimately not clear on the width of the margin of appreciation. *Chapman* is the exception. In that judgment the Court kept the margin deliberately wide, because the case concerned an area in which, in principle, States have a wide margin of appreciation: implementation of planning policies.¹⁷⁹

Chapman shows that the Court does not automatically narrow the margin of appreciation when there are countervailing reasons to leave it wide (e.g., implementation of planning policies, considerations of economic and social policy). More recently, however, the Court has established a significant precedent with *Alajos Kiss*: group vulnerability may decisively narrow the margin of appreciation, even though the case concerns an area in which States are usually granted a wide margin (in this case determination of justified restrictions on the right to vote.)¹⁸⁰ Future cases will have to tell how decisive group vulnerability exactly is within the set of factors that determine the margin of appreciation. In the next and final Part, we will turn to a topic that is closely associated with this one: the institutional position of the Court.

V. The Concept of Vulnerable Groups and the Court’s Legitimacy

The Court has recently been under fire from politicians,¹⁸¹ judges¹⁸² and scholars¹⁸³ for what is perceived as its usurpation of power from the Contracting States and its neglect to take seriously its subsidiary

¹⁷⁷ *Alajos Kiss v. Hungary*, App. No. 38832/06, 20 May 2010, ¶ 42.

¹⁷⁸ *Kiyutin v. Russia*, App. No. 2700/10, 53 Eur. H.R. Rep. 26, ¶ 65 (2011).

¹⁷⁹ *Chapman v. United Kingdom* (GC), 2001-I; 33 Eur. H.R. Rep. 18, ¶ 92 (2001).

¹⁸⁰ *Alajos Kiss v. Hungary*, App. No. 38832/06, 20 May 2010, ¶ 41.

¹⁸¹ A prominent example is the British anger over the *Hirst* case (wherein the Strasbourg Court decided that the British rule that deprives prisoners of the right to vote constitutes a violation of the Convention). *Hirst v. United Kingdom* (No. 2) (GC), App. No. 74025/01, 42 Eur. H.R. Rep. 41 (2006).

role.¹⁸⁴ Obviously, these are new variations of an old theme: courts – and supranational courts in particular – should be wary of judicial activism. In light of this type of critique, we finish by examining the institutional concerns associated with the Court’s use of group vulnerability. Two related aspects of the Court’s vulnerable-group reasoning, in particular, could raise concern that the Court is overstepping its proper role. The first is the Court’s recognition of special positive obligations towards members of vulnerable groups,¹⁸⁵ and the second is the Court’s decision to narrow the margin of appreciation in Article 14 ECHR cases.¹⁸⁶

The first type of concern has been powerfully voiced by Judge Sajó in *M.S.S. v. Belgium and Greece*. Judge Sajó raises the specter of unlimited human rights, transforming civil and political rights into social rights: “There seems to be only a small step between the Court’s present position and that of a general and unconditional positive obligation of the State to provide shelter and other material services to satisfy the basic needs of the ‘vulnerable.’”¹⁸⁷ This kind of reasoning, he claims, would be more appropriate for a “constitutional court adjudicating on the basis of a national constitution that has constitutionalised the social welfare state.”¹⁸⁸ The President of the Belgian Constitutional Court, Marc Bossuyt, agrees with Sajó and claims that the Court has fallen through “thin ice.”¹⁸⁹

In our view, those who worry that there is a general tendency on the Court’s part to read too many positive obligations into the text of the Convention – thereby putting too great of a burden on the Convention States – should not necessarily see group vulnerability reasoning as a threat. We are of the opinion that vulnerability might actually be a useful guiding principle: in the prioritization of scarce resources, States give preference to those whose needs they consider most pressing. When reviewing

¹⁸² Lord Hoffmann, *Judicial Studies Board Annual Lecture* (19 March 19, 2009) http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/Hoffmann_2009_JSB_Annual_Lecture_Universality_of_Human_Rights.pdf.

¹⁸³ Tom Zwart, *Een steviger opstelling tegenover het Europees Hof voor de Rechten van de Mens bevordert de Rechtsstaat* [A firmer position against the ECtHR enhances the rule of law], *NEDERLANDS JURISTENBLAD* 343 (2011) (Neth.).

¹⁸⁴ See generally about the Court’s institutional position: THE EUROPEAN COURT OF HUMAN RIGHTS BETWEEN LAW AND POLITICS (Jonas Christoffersen & Mikael Rads Madsen eds., 2011); and Janneke Gerards, *Judicial Deliberations in the European Court of Human Rights*, in THE LEGITIMACY OF HIGHEST COURTS’ RULINGS 407 (Nick Huls, Maurice Adams & Jacco Bomhoff eds., 2008).

¹⁸⁵ See *supra* Part III.A.

¹⁸⁶ See *supra* Part III.C.

¹⁸⁷ *M.S.S. v. Belgium and Greece*, App. No. 30696/09, 53 Eur. H.R. Rep. 2 (2011) (Sajó J., partly concurring and partly dissenting).

¹⁸⁸ *Id.* See also Dimitris Xenos, *The Human Rights of the Vulnerable*, 13 THE INT’L J. OF HUM. RTS. 591 (2009).

¹⁸⁹ Marc Bossuyt, *Belgium condemned for inhuman or degrading treatment due to violations by Greece of EU Asylum Law, M.S.S. v. Belgium and Greece, Grand Chamber, European Court of Human Rights, January 21, 2011*, EUR. HUM. RTS. L. REV. 581, 597 (2011).

States' actions on the basis of an individual complaint, the Court should have the same priority. Vulnerability can thus be viewed as a *limiting* rather than a *limitless* principle.¹⁹⁰

The second institutional issue with the vulnerable-group concept relates to the margin of appreciation. Often, the Court's preferred tactic for guarding against accusations that it is overstepping its subsidiary role consists in applying the margin of appreciation principle.¹⁹¹ In the words of Judge Spielmann: in applying the margin of appreciation "the Court imposes self-restraint on its power of review, accepting that domestic authorities are best placed to settle a dispute."¹⁹² So what if the Court were to take the line of *Alajos Kiss* and *Kiyutin* further,¹⁹³ and narrow the margin of appreciation in *all* cases that concern vulnerable groups (not just the cases that concern blanket exclusions of these groups)? We emphasize that the Court is not there yet: though it is now established case law that vulnerable groups require special protection,¹⁹⁴ the vulnerable-group concept has by no means turned into a principle that automatically narrows the margin. We do, however, think that the Court is increasingly attaching weight to group vulnerability in determining the proper margin of appreciation. But does that erode the Court's legitimacy? What should help calm down legitimacy concerns – both with regards to positive obligations and the margin of appreciation – is the fact that the Court never uses group vulnerability as an *automatic* trigger. As we have discussed in Part III, the vulnerable-group concept is always one among a set of factors, depending on the facts of the case, which determine the proper extent of positive obligations and the width of the margin of appreciation.

Nevertheless, the concerns about the Court's supra-national institutional position are real, and they are compounded by the open-endedness of the vulnerable-group concept. One way in which the Court can navigate this problem is by taking the human rights corpus as its reference point for determining group vulnerability: when the activities of international organizations and human rights reports confirm that there is a structural failure to protect the human rights of a particular group, this should be the Court's cue. The advantage of this suggestion is that it allows the vulnerable-group concept to remain flexible: if the Court continues to base its judgments on recent international human

¹⁹⁰ See also Timmer, *supra* note 7 (describing the prioritizing role of vulnerability in the case law of the Court).

¹⁹¹ See generally ANDREW LEGG, THE MARGIN OF APPRECIATION IN INTERNATIONAL HUMAN RIGHTS LAW: DEFERENCE AND PROPORTIONALITY (2012); Letsas, *supra* note 175; and CHARLES YOROW, THE MARGIN OF APPRECIATION DOCTRINE IN THE DYNAMICS OF EUROPEAN HUMAN RIGHTS JURISPRUDENCE (1996).

¹⁹² Dean Spielmann, *Allowing the Right Margin the European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?* 1 (Center for European Legal Studies Working Paper Series, Feb. 2012), available at http://www.cels.law.cam.ac.uk/cels_lunchtime_seminars/Spielmann%20-%20margin%20of%20appreciation%20cover.pdf.

¹⁹³ See *supra* Part III.C.

¹⁹⁴ See *supra* Part III.A.

rights reports and other authoritative materials, it can carefully follow developments on the ground.¹⁹⁵ A group's vulnerability will thus not be set in stone, but re-evaluated case by case. At the same time, in this way the concept does not need to be stretched so thin as to lose all power, nor does it need to become so vague as to risk legal uncertainty.¹⁹⁶

VI. Conclusion

Be it an asylum seeker struggling against deprivation, Roma children seeking to share classes with other children, or persons with mental disabilities wishing to exercise the right to vote; the fact is that all these cases reveal that vulnerability to human rights violations is often experienced more routinely and acutely by some than by others. Human rights law, however, has not always responded adequately to these particular vulnerabilities given the import of the liberal legal subject into its structure and the exclusion of those who do not fit the liberal archetype. We have argued that it is in response to these exclusions of human rights law that the Court has been forced to attend to the constructed disadvantage of certain groups. In doing so, the Court has deployed the concept of group vulnerability. In this light, we see the Court's reasoning as a way of opening up the human rights universal, as a step towards a more inclusive universal human rights subject. In our opinion, the Court thus enhances rather than undermines its own credibility.

Accordingly, we perceive the Court's increasing use of group vulnerability reasoning as a welcome development. It allows the Court to address several aspects of substantive equality, we have argued. However, group vulnerability reasoning carries pitfalls with it, most notably essentialism, stigmatization and paternalism. If the Court is not careful to avoid these pitfalls, it risks sustaining the problematic idea that these groups are the only, "true" and quintessential vulnerable subjects in human rights law; thus leaving in place the notion that the "normal" subject of human rights law is autonomous and independent.¹⁹⁷ In other words, the concept of vulnerable groups is a double-edged tool, which should be handled with care. As Martha Minow put it in another context, the concept raises "questions

¹⁹⁵ As we have mentioned above (see *supra* Part II.B), the Court has so far used the wider human rights corpus as a reference point in all its vulnerable group cases.

¹⁹⁶ Cf. Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 762 (2011) ("[T]he Court can never give heightened scrutiny to classifications of, say, twenty groups without diluting the meaning of that scrutiny").

¹⁹⁷ Cf. Fineman, *supra* note 11. See *supra* Part I.B.

of complexity” rather than “justifications for passivity, because failing to notice another's pain is an act with significance.”¹⁹⁸

¹⁹⁸ Martha Minow, *Foreword Justice Engendered*, 101 HARV. L. REV. 10, 11 (1987).

5. A Quiet Revolution: Vulnerability in the European Court of Human Rights

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*"The technique is to focus on a concept or term in common use, but also grossly under-theorized, and thus ambiguous."*¹

I. Introduction

A revolution is quietly taking place in the case law of the European Court of Human Rights ("ECtHR", "the Court" or "the Strasbourg Court"). Without occasioning much comment, the Court is increasingly relying on vulnerability reasoning. The aim of this chapter is to analyse that development and discover what potential the concept of vulnerability has to improve the legal reasoning of the ECtHR. By "improving the legal reasoning" I have something specific in mind, namely the question of how to

* Many thanks go to Lourdes Peroni for her endless willingness to discuss vulnerability in the case law of the ECtHR with me. Lourdes and I had inspiring conversations with six ECtHR judges in Strasbourg in June 2011, and I wish to thank these judges too. Furthermore, I thank Eva Brems, Martha Fineman and Anna Grear for their incisive comments. The research for this chapter was conducted within the framework of the European Research Council (ERC) Starting Grant project entitled "Strengthening the European Court of Human Rights: More Accountability through Better Legal Reasoning".

¹ Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 9 (2008-2009).

include more fully and consistently the specific concerns of marginalized people into the legal tests used by the ECtHR.²

Martha Fineman's vulnerability thesis opens up new ways of thinking about the Court's reasoning. At its most fundamental, she argues that vulnerability is the universal human condition, and that it is this condition that grounds the social contract. Vulnerability, she goes on to reason, requires a (more) responsive state. Her thesis was initially developed for an American audience. In the United States – where, as Fineman underlines, “the rhetoric of non-intervention prevails in policy discussions”³ – her claims are radical. But the thesis also holds purchase in the European context, even though Europe has traditionally been more interventionist in its orientation and practice. In fact, I am struck by the transformative potential of the vulnerability thesis precisely in the European human rights context. Through the lens of this thesis, previously overlooked elements of ECtHR case law suddenly come to the fore.

In a previous article, Lourdes Peroni and I have shown that “vulnerable groups” is an emerging concept in the case law of the ECtHR.⁴ The present chapter builds on that work and complements it by exploring vulnerability as a judicial tool of the Strasbourg Court in a broader sense. My intention is to analyse the tensions and the synergies between Fineman's vulnerability approach and the Court's vulnerability case law, in order to draw out the potential of the Court's reasoning. Part I will lay the foundations for the case law analysis by briefly discussing the vulnerability thesis and the ways in which various commentators have conceptualized its relationship to human rights. Part II will then chart and critique the ways in which the ECtHR reasons in terms of vulnerability. Next, part III will explore what kind of ability vulnerability reasoning has to change human rights law, and part IV will take an institutional perspective to show that the Court is vulnerable itself. Part V concludes the whole with some reflections about the extent to which the ECtHR, in effect, adopts an approach that is consistent with the vulnerability thesis – and to what extent it has the possibility to do so.

II. The Vulnerability Thesis and Human Rights

² This is one of the topics within the Court's case law that Eva Brems has identified as being in need of urgent redress. See Eva Brems, *Research Proposal European Research Council*, at 5–6 (manuscript on file with author).

³ Fineman, *supra* note 1, at 2.

⁴ Lourdes Peroni & Alexandra Timmer, *Vulnerable Groups: the Promise of an Emerging Concept in European Human Rights Convention Law* 11 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW (forthcoming 2013).

In the specific context of this chapter, I think of the vulnerability thesis as a conceptual way to bridge the gap between the legal subject as currently conceived of and real human beings.⁵ The vulnerability thesis is as an invitation to reimagine the “human” of human rights as a vulnerable subject, and to “redirect” human rights law in his/her image.⁶ My analysis builds primarily on the work of Martha Fineman,⁷ Anna Grear⁸ and Bryan Turner.⁹ First this Part will briefly discuss how these authors conceive of vulnerability. Then this Part will move to the human rights context and explore what light the vulnerability thesis sheds on some of the (liberal) suppositions informing human rights law subjectivity.

Real human beings – Fineman, Grear and Turner argue – are vulnerable due to their embodiment. This ontological fact forms the foundation of the vulnerability thesis. As embodied beings we are vulnerable both due to our physical openness to hurt and due to our inevitable dependence upon others (including the state) for survival.¹⁰ We cannot escape the vulnerable condition and so, as Fineman emphasizes, vulnerability is universal and constant.¹¹ As such, vulnerability is not something that only attaches to specific population groups. Fineman terms her inquiry “post-identity”.¹² However, while vulnerability is universal, our experience of it is particular. This experience is profoundly affected by social institutions; since each and every one of us is situated in “a web of economic and institutional relationships”.¹³ At the same time, these social institutions are “vulnerable entities in and of themselves”¹⁴ – this is a point that Fineman and Turner both underline. I will return to this point in my analysis of ECtHR case law.

Vulnerability theorists – and in this sense I can count myself among them – do not conceptualize vulnerability as being a purely negative condition. In fact, they attempt to reclaim “vulnerability” from its negative connotations; they warn against reducing vulnerability to “harm” and “injurability”.¹⁵ Vulnerability is also in many ways *generative*: it forges bonds between human beings and leads us to

⁵ The vulnerability thesis is a broad and ambitious framework. Inevitably, I lift just some aspects out of it for this chapter.

⁶ ANNA GREAR, REDIRECTING HUMAN RIGHTS: FACING THE CHALLENGE OF CORPORATE LEGAL HUMANITY (2010).

⁷ See, e.g., Fineman, *supra* note 1; and Martha Albertson Fineman, *The Vulnerable Subject and the Responsive State*, 60 EMORY L.J. 251 (2010).

⁸ Anna Grear, *Challenging Corporate “Humanity”: Legal Disembodiment, Embodiment and Human Rights*, 7 HUM. RTS. L. REV. 511 (2007); and GREAR, *supra* note 6.

⁹ BRYAN S. TURNER, VULNERABILITY AND HUMAN RIGHTS (2006).

¹⁰ Mary Neal, *‘Not Gods but Animals’: human dignity and vulnerable subjecthood*, 33 LIVERPOOL LAW REVIEW 177, at 186-187 (2012).

¹¹ Fineman, *supra* note 1, at 1; and Fineman, *supra* note 7, at 266-67.

¹² Fineman, *supra* note 1, at 1.

¹³ *Id.* at 10.

¹⁴ *Id.* at 12-13; and Fineman, *supra* note 7, at 273.

¹⁵ JUDITH BUTLER, PRECARIOUS LIFE: THE POWERS AND MOURNING OF VIOLENCE xii (2004).

create institutions.¹⁶ This is the basis for the normative claim (most strongly formulated in Fineman's work) that vulnerability can be turned into "a powerful conceptual tool with the potential to define an obligation for the state to ensure a richer and more robust guarantee of equality than is currently afforded".¹⁷ A vulnerability analysis does this by turning critical focus towards the institutional production of both privilege and disadvantage.¹⁸

How has vulnerability been deployed as a conceptual tool in the human rights context? In different ways, both Turner and Gear have conceptualized embodied vulnerability as being *foundational* to human rights. From a sociological perspective, Turner takes ontological vulnerability as the foundation for a defence of the universalism of human rights.¹⁹ His work sheds light on one of the difficulties facing vulnerability theorists: the fact that (the experience of) vulnerability does not by itself have prescriptive force. The problem is that, without more, vulnerability is ethically ambiguous: our corporeal vulnerability can invite care and empathy, but also violence and abuse.²⁰ Turner adds to the vulnerability thesis by recognizing that vulnerability does not automatically produce sympathy. He conceptualizes human rights law as a form of institution-building that attempts to answer this dilemma.²¹

Gear argues that vulnerability is presuppositional to human rights as both an historical and conceptual matter.²² She submits that human embodiment and its attendant vulnerability have played a foundational role both in the creation of rights discourse in the eighteenth century and in the creation of the Universal Declaration of Human Rights after World War II.²³ But the human rights story is not straightforward. Gear shows that the relationship between vulnerability and human rights is complex and contested, and that the individual that human rights law seeks to protect is not necessarily always the vulnerable subject.²⁴ On the contrary, through tracing a "genealogy of quasi-disembodiment" in human rights law, Gear makes a convincing case that the abstract liberal subject is comfortably

¹⁶ Martha Albertson Fineman, "Elderly" as Vulnerable: Rethinking the Nature of Individual and Societal Responsibility, 20 THE ELDER LAW JOURNAL 101 (2012).

¹⁷ Fineman, *supra* note 1, at 8-9.

¹⁸ Fineman, *supra* note 7, at 274.

¹⁹ TURNER, *supra* note 9.

²⁰ See, e.g., BUTLER, *supra* note 15, at Xii, 40 and 128-151; and Ann V. Murphy, 'Reality Check': Rethinking the Ethics of Vulnerability, in THEORIZING SEXUAL VIOLENCE 55, 56 and 60-63 (Renée J. Heberle & Victoria Grace eds., 2009).

²¹ TURNER, *supra* note 9, at 39-43.

²² GEAR, *supra* note 6.

²³ *Id.* at 137-149.

²⁴ Anna Gear, email to the author, 24 May 2012.

ensconced within the human rights paradigm.²⁵ One notable offshoot of this reality is that corporations now enjoy human rights – something Grear argues against. Human rights, she suggests, need “redirecting” towards a full appreciation of human embodiment (as opposed to quasi-disembodied understandings of persons and, in particular, the corporate form) and suggests that we can redirect human rights precisely by drawing on the presuppositional role of vulnerability.

In light of Grear’s argument, it is worth pausing for a moment to consider more explicitly the figure in the background of the vulnerability thesis: the “liberal subject”. Fineman, Grear and (to a lesser extent) Turner all present their vulnerability analysis as an answer to the ills associated with liberal notions of (legal) personhood.²⁶ The liberal subject is the one currently dominating both legal and political discourse in the United States and Europe: as an archetype, “he” (for this subject is male) symbolizes autonomy, independence, personal responsibility and self-sufficiency.²⁷ This is also a familiar figure in human rights law; indeed, he is a key target of critical human rights scholars.²⁸ I do not have the space here to do justice to the complexity of their arguments nor to develop a full account of legal subjectivity in the case law of the ECtHR.²⁹ In a nutshell, the difficulty is that the human rights universal is often premised on a mythical *invulnerable* subject, who is male, white, rational, autonomous, etc.³⁰ This subject, moreover, is “unable to survive without the existence of an ‘Other’”;³¹ who is everything the supposedly universal subject is not. Thus, the point is that the “allegedly neutral subject of human rights law” reproduces time-worn hierarchies of gender, race, nation, socio-economic status, religion and sexuality.³²

²⁵ GREAR, *supra* note 6, at 96-113.

²⁶ See generally about the different constructions of legal subjectivity Ngaire Naffine, *Who are Law’s Persons? From Cheshire Cats to Responsible Subjects*, 66 THE MODERN LAW REVIEW 346 (2003).

²⁷ MARTHA ALBERTSON FINEMAN, THE AUTONOMY MYTH: A THEORY OF DEPENDENCY 34 (2004); Fineman, *supra* note 1, at 10-11; and Fineman, *supra* note 16, at 116.

²⁸ See e.g., COSTAS DOUZINAS, THE END OF HUMAN RIGHTS (2000); GREAR, *supra* note 6; Dianne Otto, *Lost in Translation: Re-Scripting the Sexed Subjects of International Human Rights Law*, in INTERNATIONAL LAW AND ITS OTHERS 318 (Anne Orford ed., 2006).

²⁹ That would be a fascinating topic for future research. Others have persuasively suggested that the ECtHR fails to respond adequately when applicants do not fit the template of the liberal subject. See, e.g., DIVERSITY AND EUROPEAN HUMAN RIGHTS: REWRITING JUDGMENTS OF THE ECHR (Eva Brems ed., 2012).

³⁰ DEBRA BERGOFFEN, CONTESTING THE POLITICS OF GENOCIDAL RAPE: AFFIRMING THE DIGNITY OF THE VULNERABLE BODY 109 (2012) (“current human rights paradigms take their cue from the masculine image of the invulnerable body.”)

³¹ Ratna Kapur, *Human Rights in the 21st Century: Take a Walk on the Dark Side*, 28 SYDNEY LAW REVIEW 665, 675 (2006). See also DOUZINAS, *supra* note 28, at 357-366; and Makau Mutua, *Savages, Victims, And Saviors: The Metaphor of Human Rights*, 42 HARV. INT’L L.J. 201, 201 (2001).

³² Otto, *supra* note 28, at 318.

At the heart of the idea of universal human rights subjectivity is the notion of human dignity. Despite the voluminous scholarship on this topic,³³ the *positive* links between vulnerability and dignity are not often explored. Indeed, dignity is often associated with *invulnerability*.³⁴ According to classic Kant-based readings, dignity is about overcoming vulnerability through the use of reason.³⁵ However, some scholars – notably Mary Neal, Anna Grear and Debra Bergoffen – offer very different readings of the relationship between dignity and embodied vulnerability. In different ways, their project is to align dignity with vulnerability. Their work recognizes that both dignity and vulnerability are inherent in the human condition: the vulnerable subject is a subject with dignity. According to Grear, vulnerability is the “presuppositional” core of human dignity.³⁶ Neal takes the analysis of the relationship between these two concepts a step further, by arguing that “[d]ignity ... treats vulnerability as a *source* of value. ... all valid uses of “dignity” reflect a valuing of the sense in which human existence (perhaps uniquely) embodies a union between the fragile/material/finite and the transcendent/sublime/immortal”.³⁷ I summarize these arguments here, because the Court seems to increasingly connect vulnerability and dignity (as the next parts of this chapter will show).

To conclude these reflections, it should perhaps be clarified that the scope of this chapter is theoretically less ambitious than the work of Turner, Grear and others: this chapter does not seek to proffer a rereading of the foundations of human rights. The comments that are offered here are anchored in human rights practice, in the sense that they take the case law of the ECtHR as their focal point. I draw on vulnerability theory primarily to inform my reading of the ECtHR’s practice. At the same time, I hope that my reading of this practice will contribute – even if only in a small way – towards refining and developing the theory. In that context, I note that the case law of the ECtHR sheds light on the theoretical question – originally raised by Turner³⁸ – as to whether the vulnerability thesis is directly relevant for all human rights, or just for socio-economic rights. Turner maintains that the thesis is more directly pertinent to socio-economic than to civil-political rights. Grear disagrees, because in her view all

³³ See, e.g., Evadné Grant, *Dignity and Equality*, 7 HUM. RTS. L. REV. 299 (2007); Jürgen Habermas, *The Concept of Human Dignity and the Realistic Utopia of Human Rights*, 41 METAPHILOSOPHY 464 (2010); and Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT’L L. (2008).

³⁴ See e.g., Neal, *supra* note 10, at 190; and Jeremy Waldron, *Tanner Lectures: Dignity, Rank and Rights: The 2009 Tanner Lectures at UC Berkeley* 11 n 32 (NYU School of Law, Pub. Law & Legal Theory Research Paper Series, Working Paper No. 09-50) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1461220.

³⁵ Neal, *supra* note 10, at 197; and Waldron, *supra* note 34, at 15-16.

³⁶ GREAR, *supra* note 6, at 196-198.

³⁷ Neal, *supra* note 10, at 198.

³⁸ TURNER, *supra* note 9, at 36-37.

categories of human right presuppose embodied vulnerability.³⁹ Anticipating the next part of this chapter, which assesses the case law of the ECtHR, I wish to emphasize that the ECtHR employs vulnerability considerations to great effect both in cases that turn on socio-economic issues⁴⁰ and in cases that concern more classic civil and political rights.⁴¹ From the perspective of Strasbourg, therefore, Gear seems to be right.

Lastly, it should be emphasized that the ECtHR is by no means developing its vulnerability reasoning in a vacuum.⁴² Care for human vulnerability is part of the culture of human rights both in the Council of Europe⁴³ and in the United Nations system⁴⁴ – as evidenced by the frequent references to vulnerability in the output of these organizations. Regrettably this chapter will not be able to address the cross-fertilization between the vulnerability reasoning of these different bodies: it will now proceed to trace how the ECtHR (and the ECtHR alone) uses vulnerability considerations.

III. Vulnerability in the Case Law of the ECtHR: Thematization and Critique

This part explores how the Court conceives of vulnerability. As vulnerability is such a little-known concept of ECtHR jurisprudence, the aim here is first of all to chart the Court's vulnerability case law. By asking the question of what renders people vulnerable in the eyes of the Court, I explore how the case law fits or fails to fit with the vulnerability thesis. In order to do this, I find it useful to keep Gear's argument in mind that the historical development of the human rights movement yields two different stories: one story adopts a liberal quasi-disembodied subject and the other story adopts a human embodied vulnerable subject as the central figure of human rights. Keeping this ambivalence in mind

³⁹ GREAR, *supra* note 6, at 134-135 and 156-161.

⁴⁰ Such as housing or the provision of medical treatment for prisoners. See *infra* Part II.

⁴¹ Such as the right to a fair trial: see *Salduz v. Turkey* (GC), App. No. 36391/02, 27 November 2008, (2009) 49 Eur. H.R.R. 19, and *infra* Part II.4.

⁴² As Lourdes Peroni and I discussed in our joint paper, the Court often refers to these other instruments of human rights law when it makes a vulnerability-claim. Peroni & Timmer, *supra* note 4, at 6-7.

⁴³ This is evidenced, for example, by the work of the Committee of Ministers, the European Committee of Social Rights, the Council of Europe Commissioner for Human Rights and the European Commission on Racism and Intolerance. See, e.g., Committee of Ministers, Recommendation CM/Rec(2011)5 on reducing the risk of vulnerability of elderly migrants and improving their welfare (May 25, 2011); and THOMAS HAMMARBERG, HUMAN RIGHTS IN EUROPE: NO GROUNDS FOR COMPLACENCY. VIEWPOINTS BY THOMAS HAMMARBERG COUNCIL OF EUROPE COMMISSIONER FOR HUMAN RIGHTS (2011).

⁴⁴ See, e.g., Audrey R. Chapman & Benjamin Carbonetti, *Human Rights Protections for Vulnerable and Disadvantaged Groups: The Contributions of the UN Committee on Economic, Social and Cultural Rights*, 33 HUM. RTS. Q. 682 (2011); and Alexander H.E. Morawa, *Vulnerability as a Concept of International Human Rights Law*, 6 JOURNAL ON INTERNATIONAL RELATIONS AND DEVELOPMENT 139 (2003).

allows one to see that the Court often struggles between these competing narratives and produces contradictory impulses in relation to outcomes. On the one hand, it will quickly become apparent that the Court does not, like Fineman, conceptualize vulnerability as universal and constant. Instead, “vulnerable” is an epithet that the Court attaches to some (groups of) applicants but not to others. This part will argue that the result is that, in many ways, the Court’s vulnerability reasoning does not disturb the assumptions underpinning the liberal subject.⁴⁵ On the other hand, even though the Court’s vulnerability reasoning might not signal a complete paradigm shift, this part shall show that it does spur many sensitive and substantive case-assessments.

A) Thematization

i. Inherent vulnerability: children and persons with mental disabilities

The Court comes closest to embracing Fineman’s vulnerability thesis in its case law concerning children and people with a mental disability. Fineman’s thesis has origins in her earlier work on the inevitability of dependency: “All of us were dependent as children, and many of us will be dependent as we age, become ill or suffer disabilities.”⁴⁶ Fineman’s vulnerability approach is therefore responsive to the fact that abilities differ over the course of a lifespan.⁴⁷ The Court is responsive to this too; at least when it concerns children and people with a mental disability. These are the two types of applicants that the Court considers to be inherently and constantly vulnerable. The Court does not often make it explicit why it conceives of their vulnerability in this way, but the case law contains many references to their dependency upon the care of others,⁴⁸ and their difficulty or inability to complain of abuse or of their treatment more generally.⁴⁹ It is noteworthy that the Court has not really applied vulnerability reasoning yet in cases concerning elderly applicants. There are a few judgments in which the Court recognized that

⁴⁵ See *infra* Part II.B.

⁴⁶ FINEMAN, *supra* note 27, at 35.

⁴⁷ See, e.g., Fineman, *supra* note 1, at 12; and Fineman, *supra* note 16.

⁴⁸ See, for example, Mubilanzila Mayeka and Kaniki Mitunga v. Belgium, App. No. 13178/03, 12 October 2006, (2008) 46 E.H.R.R. 23, ¶ 51.

⁴⁹ M.C. v. Bulgaria, App. No. 39272/98, 4 December 2003, (2005) 40 E.H.R.R. 20, ¶ 183 and 58 (rape of young girl); Juppala v. Finland, App. No. 18620/03, 2 December 2008, (2010) 51 E.H.R.R. 4, ¶ 41-42; M.B. v. Romania, App. No. 43982/06, 3 November 2011, ¶ 52 (rape of a woman with mental disabilities); Keenan v. United Kingdom, App. No. 27229/95, 3 April 2001, (2001) 33 E.H. R.R. 38, ¶ 111 (imprisonment and subsequent suicide of person with a chronic mental disorder). The Court has recognized that the same can apply to elderly people: Heinisch v. Germany, App no 28274/08, 21 July 2011, ¶ 71.

an elderly person was in a vulnerable situation,⁵⁰ but the Court has not developed a jurisprudence that reflects the fact that people are differently vulnerable towards the end of their lives.⁵¹

For children and people with a mental disability, however, the Court's vulnerability reasoning has had a real effect both in participation-related and protection-related cases.⁵² Mostly via the doctrine of positive obligations (about which the next part of this chapter will say more), the Court has developed a jurisprudence that requires states to pay attention to the specificities of children⁵³ and of people with a mental disability and thus to provide them with adequate protection from human rights abuses. An example is the case of *C.A.S. and C.S. v. Romania*, concerning the failure of the authorities to investigate the sexual abuse of a seven-year-old boy:

Concerning notably the weight attached to the victim's reaction, the Court considers that the authorities were not mindful of the particular vulnerability of young people and the special psychological factors involved in cases concerning violent sexual abuse of minors, particularities which could have explained the victim's hesitations both in reporting the abuse and in his descriptions of the facts.⁵⁴

Similarly, the Court has emphasized that "the vulnerability of mentally ill persons calls for special protection".⁵⁵

Both children's rights theorists and disability rights theorists have long insisted that human rights discourse is disempowering if vulnerability is stressed to the exclusion of agency.⁵⁶ The Court shows that it is aware that vulnerability and agency go hand in hand. The Court knows how to rely on vulnerability in a way that is empowering, especially in participation-related cases. This passage from *Stanev v. Bulgaria*, a case concerning the placement of a mentally disabled man in a social care home, is an example:

⁵⁰ See, for example, *Mudric v. The Republic of Moldova*, App. No. 74839/10, 16 July 2013, ¶ 51 (concerning violence by an ex-partner against a 72-year-old woman).

⁵¹ Cf. Fineman, *supra* note 16.

⁵² I rely here on the classic two-pronged approach to children's rights. See, e.g., Tom O'Neill & Dawn Zinga (eds.), *CHILDREN'S RIGHTS: MULTIDISCIPLINARY APPROACHES TO PARTICIPATION AND PROTECTION* (2008).

⁵³ See generally Ursula Kil Kelly, *Protecting Children's Rights under the ECHR: The Role of Positive Obligations*, 61 NORTHERN IRELAND LEGAL QUARTERLY 245 (2010).

⁵⁴ *C.A.S. and C.S. v. Romania*, App. no. 26692/05, 20 March 2012, ¶ 81.

⁵⁵ *Renolde v. France*, App. No. 5608/05, 16 October 2008, ¶ 109.

⁵⁶ See, e.g., Wouter Vandenhoe & Julie Ryngaert, *Mainstreaming Children's Rights in Migration Litigation: ECtHR, Muskhadzhiyeva and others v. Belgium*, 19 January 2010, in *DIVERSITY AND EUROPEAN HUMAN RIGHTS: REWRITING JUDGMENTS OF THE ECHR* 68-92 (Eva Brems ed., 2012).

The Court considers that any protective measure should reflect as far as possible the wishes of persons capable of expressing their will. Failure to seek their opinion could give rise to situations of abuse and hamper the exercise of the rights of vulnerable persons. Therefore, any measure taken without prior consultation of the interested person will as a rule require careful scrutiny.⁵⁷

ii. Vulnerability due to State control: persons in detention

The paradigmatic image of the vulnerable person who cannot protect himself from the power of the state is found in the case law concerning detainees. It is firmly established in the Court's case law on Articles 2, 3 and 5 that people who are deprived of their liberty by the state are in a vulnerable position.⁵⁸ The Court considers persons in custody to be vulnerable because they are within the control of the authorities and, as such, their physical well-being depends on the state.⁵⁹ This has had one spectacular effect, namely that the burden of proof is reversed in detention cases: when death or injury occurs in prison, it is for the authorities, and not for the applicant, to establish what happened.⁶⁰ Conceptualizing vulnerability so narrowly that state control is the only criterion has significant limitations, however. The Court's exclusive focus on physical state control does not allow for a response to the political vulnerability of prisoners and ex-prisoners, for example. In *Scoppola v. Italy (no. 3)* the Court paradoxically held that disenfranchising certain prisoners for life could serve the legitimate aim of ensuring the proper functioning and preservation of the democratic process.⁶¹ If prisoners and ex-prisoners are not allowed to vote, who will represent them? It is relatively obvious that disenfranchising prisoners renders them more vulnerable. Another example of the Court's narrow notion of vulnerability is found in *Stummer v. Austria*; a case concerning the non-affiliation of prisoners to the pension system

⁵⁷ *Stanev v. Bulgaria* (GC), App. No. 36760/06, 17 January 2012, ¶ 153.

⁵⁸ Foundational cases include *Kurt v. Turkey* in which the Commission held: "Article 5 (Art. 5) aims to provide a framework of guarantees against abuse of power in relation to persons taken into custody. Such persons are vulnerable to a wide range of arbitrary treatment and infringements of their personal integrity and dignity." *Kurt v. Turkey* (Com.), App no 24276/94, 5 December 1996, ¶ 201. See also the Grand Chamber case of *Salman v. Turkey*: "Persons in custody are in a vulnerable position and the authorities are under a duty to protect them." *Salman v. Turkey* (GC), App. No. 21986/93, 27 June 2000, (2002) 34 E.H.R.R. 17, ¶ 99.

⁵⁹ *Denis Vasilyev v. Russia*, App. No. 32704/04, 17 December 2009, ¶ 115. The same rationale applies to conscripted servicemen, and more generally "in other situations in which the physical well-being of individuals is dependent, to a decisive extent, on the actions by the authorities", such as when the police finds an unconscious person on the street. *Id.* ¶ 115–16.

⁶⁰ See, for example, *Salman v. Turkey* (GC), App. No. 21986/93, 27 June 2000, (2002) 34 E.H.R.R. 17, ¶ 99–100.

⁶¹ *Scoppola v. Italy (no. 3)* (GC), App. No. 126/05, 22 May 2012, ¶ 91.

for work they performed while imprisoned.⁶² The seven dissenting judges held that ex-prisoners are vulnerable too, as they have less access to social services.⁶³ The majority disagreed: apparently, once outside the prison walls and therefore beyond the physical control of the state, ex-prisoners cannot count on a responsive state (or a responsive court).

iii. Vulnerability due to gender: women in domestic violence or precarious reproductive health situations

In recent cases concerning domestic violence the Court has come close to adopting a vulnerability approach. Fineman advocates that we should shift our attention to “the individual’s location within webs of social, economic, political, and institutional relationships that structure opportunities and options”.⁶⁴ In line with this, the Court acknowledges that the vulnerability of female victims of domestic violence is both physical and psychological,⁶⁵ and that this is the result of a combination of individual and social circumstances. The following quote from *Opuz v. Turkey*, the Court’s ground-breaking domestic violence case from 2009, is in this respect illustrative:

The Court considers that the applicant may be considered to fall within the group of ‘vulnerable individuals’ entitled to State protection ... In this connection, it notes the violence suffered by the applicant in the past, the threats issued by H.O. following his release from prison and her fear of further violence as well as her social background, namely the vulnerable situation of women in south-east Turkey.⁶⁶

In this case, the Court found a violation of the Convention because the state failed to comply with its positive obligation to take effective measures to protect the applicant from the violence of her husband.⁶⁷ In the cases of *Bevacqua and S. v. Bulgaria* (2008) and in *Hajduová v. Slovakia* (2010) the Court went a step further, categorically declaring that victims of domestic violence as such are

⁶² *Stummer v. Austria* (GC), App. No. 37452/02, 7 July 2011, (2012), 54 Eur. H.R.R. 11.

⁶³ *Id.* (Tulkens, Kovler, Gyulumyan, Spielmann, Popović, Malinverni and Pardalos J. dissenting, ¶ 10).

⁶⁴ Fineman, *supra* note 16, at 129.

⁶⁵ *Opuz v. Turkey*, App. No. 33401/02, 9 June 2009, (2010) 50 E.H.R.R. 28, ¶ 132.

⁶⁶ *Id.* ¶ 160.

⁶⁷ The link between vulnerability reasoning and positive obligations will be discussed in the next part of this chapter. See *infra* Part III.B.

particularly vulnerable.⁶⁸ This could also be conceptualized as a form of *ex-post* vulnerability; a person is particularly vulnerable after (and because of) suffering this kind of human rights abuse.⁶⁹ The Court's approach, however, is not consistent. In some recent domestic violence cases the Court did not acknowledge the particular vulnerability of the applicant.⁷⁰

The other area of case law in which the Court increasingly often – but not always⁷¹ – reasons from gendered vulnerability⁷² concerns reproductive health. In three well-known judgments against Poland concerning access to abortion, *Tysiac v. Poland* (2007), *R.R. v. Poland* (2011) and *P. and S. v. Poland* (2012), the Court held that the applicants in these cases were in a vulnerable situation.⁷³ It seems that their vulnerability is a result of their physical condition, their distress on account of their own (in the case of *Tysiac*) or their foetus's health (in the case of *R.R.*),⁷⁴ and their dependence upon their doctors to provide them with timely and correct information about their health and access to abortion. The first applicant in *P. and S.* was a 14-year-old girl who was pregnant as a result of rape, so these were additional factors that exacerbated her vulnerability. Dependency on doctors was also stressed as a vulnerability factor by Judges Sajó and Tulkens in a dissenting opinion in a case that concerned the question whether women should have the right to give birth at home.⁷⁵ Thus we see that the theme of

⁶⁸ *Bevacqua and S. v. Bulgaria*, App. No. 71127/01, 12 June 2008, ¶ 65; *Hajduová v. Slovakia*, App. No. 2660/03, 30 November 2010, (2011) 53 Eur. H.R.R. 8, ¶ 46 (“The Court notes in this respect that the particular vulnerability of the victims of domestic violence and the need for active State involvement in their protection has been emphasized in a number of international instruments”). See also ¶ 41 and 50. Similarly *Eremia and Others v. The Republic of Moldova*, App. No. 3564/11, 28 May 2013, ¶ 73.

⁶⁹ Understood this way, torture victims also suffer from *ex-post* vulnerability; *Aydin v. Turkey*, App. No. 23178/94, 26 August 1997, (1998) 25 Eur. H.R.R. 251, ¶ 103.

⁷⁰ See, for example, *A. v. Croatia*, 55164/08, 14 October 2010.

⁷¹ The Grand Chamber abortion case of *A, B, and C v. Ireland*, for example, makes no mention of vulnerability. *A, B, and C v. Ireland* (GC), App. No. 25579/05, 16 December 2010, (2011) 53 Eur. H.R.R. 13.

⁷² But see also *B.S. v. Spain*, App. No. 47159/08, 24 July 2012, ¶ 71 (a case concerning police violence against a sex-worker of African descent).

⁷³ *Tysiac v. Poland*, App. No. 5410/03, 20 March 2007, (2007) 45 Eur. H.R.R. 42, ¶ 127; *R.R. v. Poland*, App. No. 27617/04, 26 May 2011, (2011) 53 Eur. H.R.R. 31, ¶ 159; *P. and S. v. Poland*, App. No. 57375/08, 30 October 2012, ¶ 110 and 162-166.

⁷⁴ In *R.R.* the Court held that “the applicant was in a situation of great vulnerability. Like any other pregnant woman in her situation, she was deeply distressed by information that the foetus could be affected with some malformation.” The Court shows great empathy for the situation that this woman was in and recognizes that she suffered “painful uncertainty” and “acute anguish” and that she was “humiliated”. *R.R. v. Poland*, App. No. 27617/04, 26 May 2011, (2011) 53 Eur. H.R.R. 31, ¶ 159–60.

⁷⁵ *Ternovszky v. Hungary*, App. No. 67545/09, 14 December 2010 (Sajo J and Tulkens J dissenting) (“the expectant mother has to interact during the period of pregnancy with authorities and regulated professionals who act as figures of some kind of public authority vis-à-vis the pregnant person, who is understandably very vulnerable because of her dependency”).

dependency – which is also very important in the work of Martha Fineman – is recurring throughout different areas of the Court’s vulnerability reasoning.

iv. *Vulnerability due to a legal power imbalance: persons who are accused & persons who lack legal capacity*

One of the Court’s successful deployments of vulnerability reasoning is found in the influential⁷⁶ case of *Salduz v. Turkey*.⁷⁷ In *Salduz*, the Court has held that “an accused often finds himself in a particularly vulnerable position” in the investigative stage of criminal proceedings.⁷⁸ The Court continued: “In most cases, this particular vulnerability can only be properly compensated for by the assistance of a lawyer whose task it is, among other things, to help to ensure respect of the right of an accused not to incriminate himself.”⁷⁹ This has since become the standard under Article 6 § 3 (c) of the Convention (right to a fair trial). This is a sound instance of vulnerability reasoning, because the Court convincingly diagnoses the reason why people who are accused of a crime are particularly vulnerable – they could easily experience pressure to incriminate themselves – and, subsequently, the Court requires that a “responsive State”⁸⁰ “counter[s] the power imbalance”⁸¹ by giving the accused the right to legal assistance.

In the same line of successful vulnerability reasoning concerning legal power imbalances is *Zehentner v. Austria*.⁸² In fact, the applicant in that case had no legal power at all, as she had a legal guardian appointed for her. Her complaint at Strasbourg related to the fact that she had not been able to institute legal proceedings against the forced sale of her house. The Court holds that: “persons who lack legal capacity are particularly vulnerable and States may thus have a positive obligation under Article 8 to provide them with specific protection by the law”.⁸³

v. *Vulnerability due to espousal of unpopular views: demonstrators and journalists*

⁷⁶ As a result of this ruling, many European states had to amend their laws. See, e.g., Chrisje Brants, *The Reluctant Dutch Response to Salduz*, 15 EDINBURGH LAW REVIEW 298 (2011).

⁷⁷ *Salduz v. Turkey* (GC), App. No. 36391/02, 27 November 2008, (2009) 49 Eur. H.R.R. 19.

⁷⁸ *Id.* ¶ 54.

⁷⁹ *Id.*

⁸⁰ Fineman, *supra* note 7.

⁸¹ *Paskal v. Ukraine*, App. No. 24652/04, 15 September 2011, ¶ 76.

⁸² *Zehentner v. Austria*, App. No. 20082/02, 16 July 2009, (2011) 52 Eur. H.R.R. 22.

⁸³ *Id.* ¶ 63.

In the context of Article 11 of the Convention (the right to peaceful assembly and association), the Court has held that: [the positive obligation of the state to secure the effective enjoyment of these freedoms] “is of particular importance for persons holding unpopular views or belonging to minorities, because they are more vulnerable to victimisation.”⁸⁴ This reasoning comes from the judgments in *Baczkowski and Others v. Poland* and *Alekseyev v. Russia*, both concerning applicants who wanted to organize a demonstration to draw attention to discrimination against gays and lesbians. The Court has also been known to recognize the vulnerability of Ukrainian journalists “who cover politically sensitive topics” and who thereby “place themselves in a vulnerable position *vis-à-vis* those in power (as evidenced by the death of eighteen journalists in Ukraine since 1991)”.⁸⁵

What makes these various people who espouse unpopular views vulnerable? One way of looking at these cases is that they all concern human rights defenders.⁸⁶ Another way of looking at them is that these cases all concern people who are isolated from the mainstream. The theme that was just discussed – vulnerability due to a power imbalance – also clearly plays a role here.

vi. Vulnerability in the context of migration: detention and expulsion of asylum seekers

The Court’s vulnerability reasoning with regard to “irregular” migrants is complex and problematic. Regrettably but not surprisingly, the Court often fails to respond to the vulnerability of asylum seekers.⁸⁷ However, there are also positive developments in the jurisprudence. The Court now struggles between a classical liberal human rights discourse – a discourse bound up with Westphalian sovereignty⁸⁸ – and a discourse that is more receptive of real lived vulnerability. I will illustrate the Court’s difficulties with formulating an appropriate response to the vulnerability of asylum seekers through an analysis of the

⁸⁴ *Baczkowski and Others v. Poland*, App. No. 1543/06, 3 May 2007, (2009) 48 Eur. H.R.R. 19, ¶ 64. See also *Alekseyev v. Russia*, App. Nos. 4916/07, 25924/08 and 14599/09, 21 October 2010, ¶ 70.

⁸⁵ *Congadze v. Ukraine*, App. No. 34056/02, 8 November 2005, ¶ 168; and *Gazeta Ukraina-Tsentr v. Ukraine*, App. No. 16695/04, 15 July 2010, ¶ 51.

⁸⁶ This reading strokes well with human rights soft law which calls for the special protection of human rights defenders. See, for example, G.A. Res. 53/144, U.N. Doc. A/RES/53/144 (8 March 1999).

⁸⁷ There is a lot of literature discussing the failure of human rights to include (the vulnerability of) migrants and refugees in its system. See, e.g., DOUZINAS, *supra* note 28, at 141-144; MARIE-BÉNÉDICTE DEMBOUR & TOBIAS KELLY, ARE HUMAN RIGHTS FOR MIGRANTS? CRITICAL REFLECTIONS ON THE STATUS OF IRREGULAR MIGRANTS IN EUROPE AND THE UNITED STATES (2011); and GREAR, *supra* note 6, at 150-156.

⁸⁸ See e.g., Galina Cornelisse, *A new articulation of human rights, or why the European Court of Human Rights should think beyond Westphalian sovereignty*, in ARE HUMAN RIGHTS FOR MIGRANTS? CRITICAL REFLECTIONS ON THE STATUS OF IRREGULAR MIGRANTS IN EUROPE AND THE UNITED STATES 99 (Marie-Bénédicte Dembour & Tobias Kelly eds., 2011).

case law concerning detention conditions and *non-refoulement*.⁸⁹ Both these types of cases are litigated under the prohibition of inhuman and degrading treatment (Article 3).

The Court's deportation cases, in particular, are inconsistent and distressing from a vulnerability perspective. The question the Court seems most concerned with in such cases is the question of *which state should bear the responsibility* of taking care of migrants: the receiving state or the state of origin. When defining the scope of the term "ill-treatment" under Article 3 in deportation cases, the Court makes a distinction between future harm that would emanate from "the intentional acts or omission of public authorities or non-State bodies" and the kind of harm that emanates from "a naturally occurring illness and the lack of sufficient resources to deal with it in the receiving country".⁹⁰ Only when a rights-holder is in danger of suffering the first kind of harm – namely political persecution – is there a chance⁹¹ that the ECtHR will interfere. In other words, only when a migrant is vulnerable to political persecution in her home country can this put a responsibility on the receiving European country not to deport her. Within these narrow confines, the expulsion case that is most promising from a vulnerability perspective is *Salah Sheekh v. Netherlands*.⁹² This case is promising since the Court's vulnerability analysis combines both individual elements (concerning the applicant's own history of victimization and his family's) and group-based elements (concerning the vulnerability of the Ashraf minority).

(In)famously, in *N. v. UK* the state-oriented approach that only recognizes vulnerability on the ground of political persecution,⁹³ has led the Court to approve the expulsion of a woman who suffered from AIDS after she had lived in the UK for ten years.⁹⁴ The woman was in a stable condition thanks to the medication that she had received in the UK, but the Court knew that deportation to her native Uganda would quickly lead to her death due to lack of available medication. Fineman's vulnerability

⁸⁹ That is not to say that vulnerability does not play a role in other types of migrant cases; I just think that in these cases vulnerability considerations are most pronounced.

⁹⁰ *N. v. United Kingdom*, App. No. 26565/05, 27 May 2008, (2008) 47 Eur. H.R.R. 39, ¶ 43; *Sufi and Elmi v. United Kingdom*, App. Nos. 8319/07 and 11449/07, 28 June 2011, (2012) 54 Eur. H.R.R. 9, ¶ 281.

⁹¹ But no guarantee: the Court has often held that an applicant is not so vulnerable in his or her home country as to make deportation incompatible with the prohibition of inhuman treatment. See, for example, *Samina v. Sweden*, app no 55463/09, 20 October 2011, ¶ 62–5; and *S.S. v. UK*, inadmissible, 24 January 2012, app no 12096/10, ¶ 74 ("the Court finds that in the present case the applicant, a healthy male of 27 years of age, has failed to submit any evidence to the Court to indicate that he would be unable to cater for his most basic needs in Kabul or that he has any particular vulnerability ... to suggest that his removal to Kabul would subject him to destitution or engage Article 3 of the Convention").

⁹² *Salah Sheekh v. Netherlands*, App No. 1948/04, 11 January 2007, (2007) 45 Eur. H.R.R. 50. See particularly ¶ 140 and 146.

⁹³ *D. v. UK* (1997) is the one – and so far exceptional – case where the Court stopped the deportation of a man on ground of his illness. *D. v. United Kingdom*, App. No. 30240/96, 2 May 1997, (1997) 24 Eur. H.R.R. 423.

⁹⁴ *N. v. United Kingdom*, App. No. 26565/05, 27 May 2008, (2008) 47 Eur. H.R.R. 39.

thesis calls attention to the utter inadequacy of conceiving of vulnerability in this truncated manner: embodied vulnerability to sickness, drought, and food shortage cannot be separated from embodied vulnerability to – say – violence and government-led exploitation.

However, as I suggested at the start of this sub-paragraph, there are also glimmers of hope that the Court is moving towards a fuller recognition of lived vulnerability.⁹⁵ Most significant in terms of developing a vulnerability thesis that can do justice to asylum seekers is the Grand Chamber case of *M.S.S. v. Belgium and Greece* from 2011, concerning an Afghan asylum seeker who entered Europe through Greece where he was first held in detention and later released on the streets from where he eventually made his way to Belgium.⁹⁶ As regards the conditions of his detention, the Court held: “In the present case the Court must take into account that the applicant, being an asylum seeker, was particularly vulnerable because of everything he had been through during his migration and the traumatic experiences he was likely to have endured previously.”⁹⁷ Moreover, as regards his living conditions once he was released from detention, the Court held:

[T]he Court considers that the Greek authorities have not had due regard to the applicant’s vulnerability as an asylum seeker and must be held responsible, because of their inaction, for the situation in which he has found himself for several months, living in the street, with no resources or access to sanitary facilities, and without any means of providing for his essential needs.⁹⁸

In this context, the applicant’s dependency on the state was certainly a consideration for the Court.⁹⁹

On top of this, the Court held that Belgium violated Article 3 of the Convention, by sending M.S.S. back to Greece and thereby back to such appalling detention and living conditions. That makes this case directly relevant for future expulsion cases. *M.S.S.* represents an important step towards an embrace of the vulnerable subject in asylum law. Lourdes Peroni and I have extensively analysed this case in our article on vulnerable groups so I will not discuss it here any further,¹⁰⁰ except to say that, in some cases

⁹⁵ Some voices on the Court – notably the dissenters in *N. v. UK* – call for an “integrated approach” that combines civil-political rights with their social dimension. *Id.* ¶ 6 (Judges Tulkens, Bonello and Spielmann J., dissenting).

⁹⁶ *M.S.S. v. Belgium and Greece*, App. No. 30696/09, 21 January 2011, (2011) 53 Eur. H.R. Rep. 2.

⁹⁷ *Id.* ¶ 232.

⁹⁸ *Id.* ¶ 263.

⁹⁹ *Id.* ¶ 253.

¹⁰⁰ Peroni & Timmer, *supra* note 4.

that have been delivered since *M.S.S.*, the Court finds it difficult to reconcile the traditional approach epitomized in *N v. UK* with the vulnerability approach of *M.S.S.*¹⁰¹

vii. Vulnerability due to group-membership: Roma, people with impaired health, and (to some extent) asylum seekers

M.S.S. leads to the next strand of case law in which the Court reasons from vulnerability: the cases that concern discrimination on account of group-membership. The Court has used the concept of “vulnerable groups” in relation to Roma,¹⁰² people with mental disabilities,¹⁰³ people living with HIV¹⁰⁴ and – to a limited extent – asylum seekers.¹⁰⁵ Lourdes Peroni and I have discussed this concept in our joint paper,¹⁰⁶ but I just mention it here in order to be as complete as possible in this thematization of vulnerability in the Court’s case law. We came to the conclusion that the Court’s use of the “vulnerable group” concept does not chime well with Fineman’s vulnerability thesis – which explicitly rejects an identity-based focus – but we have nevertheless welcomed the concept as a positive move towards a more robust notion of equality.

viii. Compounded vulnerability

The Court’s docket includes a high number of complaints of people considered to be vulnerable due to a combination of the reasons mentioned above, such as children who are held in asylum seekers centers;¹⁰⁷ physically and/or mentally disabled persons who are held in prison¹⁰⁸ (or who died there and

¹⁰¹ See *Sufi and Elmi v. United Kingdom*, App. Nos. 8319/07 and 11449/07, 28 June 2011, (2012) 54 Eur. H.R.R. 9, ¶ 278–83.

¹⁰² See, for example, *D.H. and Others v. the Czech Republic (GC)*, App. No. 57325/00, 47 Eur. H. R. Rep. 3 (2007); and *V.C. v. Slovakia*, App. No. 18968/07, 8 November 2011.

¹⁰³ *Alajos Kiss v. Hungary*, App. No. 38832/06, 20 May 2010; and *Z.H. v. Hungary*, App. No. 28973/ 11, 8 November 2012.

¹⁰⁴ *Kiyutin v. Russia*, App. No. 2700/10, 10 March 2011, (2011) 53 Eur. H.R. Rep. 26.

¹⁰⁵ The example is *M.S.S. v. Belgium and Greece*, App. No. 30696/09, 21 January 2011, (2011) 53 Eur. H.R. Rep. 2.

¹⁰⁶ Peroni & Timmer, *supra* note 4.

¹⁰⁷ See, for example, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, App. No. 13178/03, 12 October 2006, (2008) 46 E.H.R.R. 23.

¹⁰⁸ See, for example, *Raffray Taddei v. France*, App. No. 36435/07, 21 December 2010; *Slawomir Musial v. Poland*, App. No. 28300/06, 20 January 2009, ¶ 96 (“Undeniably, detained persons who suffer from a mental disorder are more susceptible to the feeling of inferiority and powerlessness. ... The Court accepts that the very nature of the applicant’s psychological condition made him more vulnerable than the average detainee”).

whose cases are judged with regard to their vulnerability while alive¹⁰⁹); female detainees who have been subjected to a forced gynaecological examination;¹¹⁰ and, more generally, particularly vulnerable women (read: young, old, imprisoned, disabled, etc.) who have been sexually abused.¹¹¹ Analogous to the idea of compounded discrimination,¹¹² I would call this “compounded vulnerability”. In such situations, the Court sometimes speaks of “extreme vulnerability”,¹¹³ “double vulnerability”,¹¹⁴ or “great vulnerability”.¹¹⁵

It appears that when the Court is of the opinion that an applicant is vulnerable on multiple grounds, the Court is inclined to attach great importance to this fact. Indeed, compounded vulnerability has been known to *trump* other considerations. This is most clearly stated in a case concerning the detention of children in a Belgian asylum centre. The Court held in *Muskhadzhiyeva and Others v. Belgium*: “la situation d’extrême vulnérabilité de l’enfant était déterminante et prédominait sur la qualité d’étranger en séjour illégal” (which I would loosely translate as: “the extremely vulnerable situation of the child was decisive and took precedence over her status as an illegal immigrant”).¹¹⁶ This reasoning is very promising, as the Court explicitly distances itself from a sovereignty approach in favour of a vulnerability approach.

B) Critique

¹⁰⁹ See, for example, *Keenan v. United Kingdom*, App. No. 27229/95, 3 April 2001, (2001) 33 E.H. R.R. 38; *Jasinskis v. Latvia*, App. No. 45744/08, 21 December 2010.

¹¹⁰ *Juhnke v. Turkey*, App. No. 52515/99, 13 May 2009, (2009) 9 Eur. H.R.R. 24, ¶ 76–7.

¹¹¹ See, for example, *M.B. v. Romania*, App. No. 43982/06, 3 November 2011, ¶ 52 and 57 (rape of a woman with mental disabilities); *Aydin v. Turkey*, App. No. 23178/94, 26 August 1997, (1998) 25 Eur. H.R.R. 251, ¶ 83–4 (rape of a Kurdish girl in prison); *X.Y. v. Netherlands* A 91 (1986); (1986) 8 Eur. H.R.R. 235 (rape of a 16-year-old girl with mental disabilities); *M.C. v. Bulgaria*, App. No. 39272/98, 4 December 2003, (2005) 40 E.H.R.R. 20, ¶ 183 (investigation of twice-raped 14-year-old girl).

¹¹² Defined “as a situation in which discrimination on the basis of two or more grounds add to each other to create a situation of compound[ed] discrimination”. Timo Makkonen, *Multiple, Compound and Intersectional Discrimination: Bringing the Experiences of the Most Marginalized to the Fore* 10 (Institute for Human Rights, Åbo Akademi University, 2002) available at <http://web.abo.fi/instut/imr/norfa/timo.pdf>.

¹¹³ *G. v. France*, App. No. 27244/09, 23 February 2012, ¶ 77 (prisoner with mental disorder); *Kanagaratnam e.a. v. Belgium*, App. No. 15297/09, 13 December 2011, ¶ 62 (detention of mother and three children); *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, App. No. 13178/03, 12 October 2006, (2008) 46 E.H.R.R. 23, ¶ 103.

¹¹⁴ *De Donder en De Clippel v. Belgium*, App. No. 8595/06, 6 December 2011, ¶ 75.

¹¹⁵ *M.S. v. United Kingdom*, App. No. 24527/08, 3 May 2012, ¶ 44.

¹¹⁶ *Muskhadzhiyeva and Others v. Belgium*, App. No. 41442/07 41442/07, 3 May 2012, ¶ 56. This is actually the Court’s summary of *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, App. No. 13178/03, 12 October 2006, (2008) 46 E.H.R.R. 23, ¶ 55.

Does this overview of the Court's quite extensive vulnerability reasoning show that the Court has adopted the vulnerability thesis? No. The Court does not conceptualize vulnerability as universal and constant, nor does it fully move beyond liberal notions of legal subjectivity. The crux of the problem is that the Court's vulnerable subjects (prisoners, people with a mental disability, migrants, etc.) are examples of marginalized and stigmatized subjects: they do not function as an alternative to the liberal subject, but are classic examples of liberalism's "Others".¹¹⁷ Labelling only these subjects as vulnerable does not challenge the idea that there is such a thing as an *invulnerable* subject (who does *not* suffer from all the impediments described in the paragraph above, such as dependence), nor does it challenge the hold of this fictional creature on human rights law. In other words, the Court does not really disrupt the vulnerable/invulnerable binary – nor for that matter the related binary of autonomous/dependent.¹¹⁸

Drawing on the work of Fineman and Dianne Otto, the somewhat bleak suggestion presents itself that as long as the Court does not do something radical, namely jettisoning the liberal subject and putting the universally vulnerable subject in its place, it is doomed to reinforce the marginalization of the very people it seeks to protect.¹¹⁹ I am, however, not prepared to draw the conclusion that the Court's vulnerability reasoning is a failure:¹²⁰ on the contrary, my analysis so far has shown that this reasoning has resulted in many context-sensitive judgments. The next part of this chapter will explore this further. On a more ideological level, the Court does in some ways move beyond liberal assumptions, in my opinion. The results of the Court's vulnerability reasoning in the context of existing human rights theory and practice will also be discussed below.

IV. The Ability of Vulnerability

So far, this chapter has noted that in important ways the Court's vulnerability reasoning does not fit Fineman's thesis, but that there are aspects to it that are encouraging and constructive. The present part will further unpack the power and transformative promise of the Court's reasoning. How does vulnerability add to the Court's existing jurisprudence? My analysis will show that proportionality and

¹¹⁷ See *supra* Part I. I am grateful to Anna Gear for emphasizing this point.

¹¹⁸ Cf. Otto, *supra* note 28, at 354.

¹¹⁹ *Id.* at 351.

¹²⁰ See also Peroni & Timmer, *supra* note 4.

positive obligations are the primary jurisprudential conduits through which vulnerability is leaving its mark. The result is, I argue, (A) a prioritization among the different claims on the ECtHR, and (B) an extension of rights.

A) Prioritizing among Different Claims

This sub-paragraph will show that vulnerability considerations lead the Court to prioritize both in its workload and in its case-assessments. Vulnerability's potential to prioritize – and the role that the judiciary can play in this respect – has not been much explored in the work of the theorists that was discussed in Part I. This is therefore an area in which the ECtHR's practice could inform the vulnerability thesis.

i. Workload prioritization: vulnerability and the priority policy determining the order of cases

Vulnerability considerations play a role in the Court's arrangement of its work schedule. This is evidenced by the Court's "priority policy". This policy is designed to allow the Court to face its massive caseload crisis by giving precedence to the cases that are most urgent. The policy has devised seven categories of cases. A case that is classified in one of the lower categories is likely to "remain on the docket virtually eternally" and so this classification carries huge practical significance.¹²¹ Vulnerability considerations are not mentioned in any of the categories but in my opinion they are implicit in the first – as well as pertinent to the third:

- I. Urgent applications (in particular risk to life or health of the applicant, other circumstances linked to the personal or family situation of the applicant, particularly where the well-being of a child is at issue, application of Rule 39 of the Rules of Court).
- III. Applications which on their face raise as main complaints issues under Articles 2, 3, 4 or 5 § 1 of the Convention ('core rights'), irrespective of whether they are repetitive, and

¹²¹ Antoine Buyse, *The Court's New Priority Policy*, ECHR BLOG (Nov. 17, 2010, 9:53AM), <http://echrblog.blogspot.nl/2010/11/courts-new-priority-policy.html>.

which have given rise to direct threats to the physical integrity and dignity of human beings.¹²²

The first category makes specific mention of two groups that are considered *especially* vulnerable:¹²³ children and applicants who have requested an interim measure – these are often “irregular” migrants who face deportation.¹²⁴ The third category mentions physical integrity and dignity of human beings together; thus linking dignity to embodiment. In different ways, therefore, embodied vulnerability is key to both categories.¹²⁵

ii. Substantive prioritization: vulnerability and proportionality

By substantive prioritization I mean the kind of prioritization that occurs in the case law itself: a prioritization between claims. Here, a distinction should be made between Article 3 cases, concerning the absolute prohibition of torture and inhuman and degrading treatment, and cases that concern qualified Convention rights (meaning rights which do permit of balancing). In the first type of case the central question is whether treatment reaches “the minimum level of severity” in order to engage Article 3. In this test, vulnerability weighs heavily and can have absolute prioritizing force. The case of *Muskhadzhiyeva and Others v. Belgium* is a good example.¹²⁶

The focus here is on the second type of case; namely the type that concerns rights which – by virtue of their formulation in the Convention – can be restricted. As is well known, the ECtHR performs a proportionality analysis in such cases. The virtues of proportionality analysis in human rights law are contested,¹²⁷ as is the Court’s application of the analysis.¹²⁸ From the perspective of the vulnerability thesis, the Court’s proportionality reasoning – with its attendant discourse of “conflicts of rights” – is

¹²² ECtHR, *The Court’s Priority Policy*, available at http://www.echr.coe.int/NR/ronlyres/AA56DA0F-DEE5-4FB6-BDD3-A5B34123FFAE/0/2010__Priority_policy__Public_communication.pdf.

¹²³ See *supra* Part II.A.

¹²⁴ See European Council of Refugees and Exiles, *Research on ECHR Rule 39 Interim Measures* (April 2012), available at <http://www.ecre.org/component/content/article/56-ecre-actions/272-ecre-research-on-rule-39-interim-measures.html>. The former President of the Court, Judge Costa, has noted about these cases that “the application of Rule 39 has preserved the physical integrity, the liberty and even the lives of many people who by definition are vulnerable.” ECtHR, *Annual Report 2011* 40 (Registry of the ECtHR, 2012).

¹²⁵ I am grateful to Anna Gear for sharing this insight.

¹²⁶ See *supra* Part II. A.viii.

¹²⁷ See *e.g.*, Stavros Tsakyrakis, *Proportionality: An Assault on Human Rights?*, 7 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 468 (2009).

¹²⁸ See, *e.g.*, Janneke Gerards & Hanneke Senden, *The Structure of Fundamental Rights and the European Court of Human Rights*, 7 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 619 (2009).

troubling. The problem is that harm to real and vulnerable individuals gets reduced to harm to “conflicting rights and interests”,¹²⁹ while, in the meantime, the vulnerable human being risks getting “lost in translation”.¹³⁰

Leaving aside the conceptual critique for a moment, vulnerability does play an increasingly prominent role in the Court’s proportionality analysis. To quote from a dissent by Judge Power: “vulnerability is a factor to be weighed in the balance.”¹³¹ How much weight the Court attaches to vulnerability is ambiguous, however. Nevertheless, a *bottom line* has emerged: the Court insists that – at the very least – the state should take the particular vulnerability of the persons it is dealing with into account. *Whenever a Government completely omits to consider the particular vulnerability of an individual rights-holder, it will not be able to pass the Strasbourg proportionality analysis.*¹³² In other words, paying attention to the particular construction of vulnerability has turned into a procedural requirement.¹³³ This insistence on an appreciation of particularity is very promising and I see no reason why this kind of analysis cannot inform more than the marginalized subjects cases described in Part II, above. Once the state can prove that it has complied with the minimum (procedural) requirement of not ignoring particular vulnerabilities, then it will depend on the circumstances of the case – and of the sort of vulnerability in question – how far the Court will go in prioritizing the protection of particularly vulnerable people over other (often economic) considerations.¹³⁴ There is no readily available formula that determines the weight – and thereby the prioritizing force – of vulnerability.

¹²⁹ Moshe Cohen-Eliya & Iddo Porat, *Proportionality and the Culture of Justification*, 59 AMERICAN JOURNAL OF COMPARATIVE LAW 463, 470 (2011).

¹³⁰ Otto, *supra* note 28. This is again the question of who is law’s subject: see *supra* Part I. Suzanne Baer has made an analogous critique of the language of “conflicts of rights”. See Suzanne Baer, *A closer look at law: human rights as multi-level sites of struggles over multi-dimensional equality*, 6 UTRICHT LAW REVIEW 56, 63-64 (2010).

¹³¹ F.H. v. Sweden, App. No. 32621/06, 20 January 2009 (Power and Zupančič J., dissenting).

¹³² See, for example, Zehentner v. Austria, App. No. 20082/02, 16 July 2009, (2011) 52 Eur. H.R.R. 22, ¶ 63-5; Yordanova v. Bulgaria, App. No. 25446/06, 24 April 2012, ¶ 129 (concerning an “outcast community of Roma” who the Court acknowledges to be vulnerable: “In the context of Article 8, in cases such as the present one, the applicants’ specificity as a social group and their needs must be one of the relevant factors in the proportionality assessment that the national authorities are under a duty to undertake.”)

¹³³ This requirement also applies in the context of the absolute prohibition on torture and inhuman or degrading treatment. See, for example, Okkali v. Turkey, App. No. 52067/99, 17 October 2006, (2010) 50 Eur. H.R.R. 43, ¶ 70 (“the authorities could have been expected to lend a certain weight to the question of the applicant’s vulnerability.”) (concerning a child who was beaten in custody); and B.S. v. Spain, App. No. 47159/08, 24 July 2012, ¶ 71.

¹³⁴ See also Wouter Vandenhoe, *Conflicting Economic and Social Rights: the Proportionality Plus Test*, in CONFLICTS BETWEEN FUNDAMENTAL RIGHTS 559, 565-567 (Eva Brems ed., 2008) (arguing that in case of conflicts of socio-economic rights with serious resource implications, priority should be given to the rights of the most vulnerable groups.).

B) Extending Rights (via the Doctrine of Positive Obligations): The Court as an Asset-Conferring Institution

Christopher McCrudden has argued that one of the uses of human dignity in human rights law is to “justify the creation of new, and the extension of existing, rights”.¹³⁵ Vulnerability reasoning is put to similar use by the Strasbourg Court – sometimes alone and sometimes explicitly in conjunction with dignity reasoning. It is mainly through the doctrine of positive obligations that the Court has repeatedly extended existing rights on the ground of vulnerability considerations.¹³⁶

In the first place, the Court has relied on vulnerability considerations to legitimize the gradual extension of positive obligations into the socio-economic sphere. The asylum case of *M.S.S. v. Belgium and Greece*, which was discussed in the last part, is a good example.¹³⁷ Another example comes from a Roma rights case (which is reasoned from group-vulnerability), namely *Yordanova and others v. Bulgaria*. The Court held:

Article 8 does not in terms give a right to be provided with a home ... and, accordingly, any positive obligation to house the homeless must be limited ... However, an obligation to secure shelter to particularly vulnerable individuals may flow from Article 8 of the Convention in exceptional cases. (citations omitted)¹³⁸

Secondly, the Court has also responded to vulnerability by deepening existing positive obligations; for example by turning an obligation of care into an obligation of result. In the case of *M.S. v. UK*, the Court has held that the authorities are under an obligation to ensure detainees with mental health problems are given adequate treatment.¹³⁹ This is a good example of a case in which obeying the minimum rule of heeding particular vulnerability was not enough:¹⁴⁰ even though the police showed “real concern”¹⁴¹ for

¹³⁵ Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUROPEAN JOURNAL OF INTERNATIONAL LAW 655, 721-722 (2008).

¹³⁶ See generally ALASTAIR MOWBRAY, THE DEVELOPMENT OF POSITIVE OBLIGATIONS UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS BY THE EUROPEAN COURT OF HUMAN RIGHTS (2004).

¹³⁷ *M.S.S. v. Belgium and Greece*, App. No. 30696/09, 21 January 2011, (2011) 53 Eur. H.R. Rep. 2, ¶ 263. See also Peroni & Timmer, *supra* note 4, at 12.

¹³⁸ *Yordanova v. Bulgaria*, App. No. 25446/06, 24 April 2012, ¶ 130.

¹³⁹ *M.S. v. United Kingdom*, App. No. 24527/08, 3 May 2012.

¹⁴⁰ Another example is *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, App. No. 13178/03, 12 October 2006, (2008) 46 E.H.R.R. 23, ¶ 52.

¹⁴¹ *M.S. v. United Kingdom*, App. No. 24527/08, 3 May 2012, ¶ 31.

the detainee, the Court still found a violation of the Convention. The Court held the government responsible for degrading treatment, because:

[T]he applicant was in a state of great vulnerability throughout the entire time at the police station, as manifested by the abject condition to which he quickly descended inside his cell. He was in dire need of appropriate psychiatric treatment, as each of the medical professionals who examined him indicated. The Court considers that this situation, which persisted until he was at last transferred ... early on the fourth day, diminished excessively his fundamental human dignity.¹⁴²

In these paragraphs, the Court relies on vulnerability to create a richer understanding of what it means to respect human dignity. By underpinning dignity with vulnerability considerations, the Court creates a holistic picture of the sufferings of the applicant: a picture that includes contextual factors such as embodiment, location, mental state and material realities. These vulnerability considerations lead the Court to insist on a substantive obligation (the authorities should have arranged for timely psychiatric treatment) rather than just a procedural obligation of care.

The positive obligation cases that were quoted in this paragraph, *Yordanova and others v. Bulgaria* and *M.S. v. UK*, illustrate that vulnerability reasoning can be understood as the Court's way of specifying what rights mean to differently situated people. At the same time, these cases are examples of the ways in which the Court interprets the Convention in an evolutive manner. Commentators usually focus on the "the Convention as a living instrument" concept when discussing the Court's progressive manner of interpretation;¹⁴³ but it is time to acknowledge that vulnerability is also part of the Court's toolbox of concepts that it uses to create its dynamic approach.¹⁴⁴

Importantly, the Court's reliance on vulnerability considerations to deepen positive obligations and to extend them into the socio-economic sphere is perfectly consistent with Fineman's thesis. Fineman does not use the term "positive obligations" (which is not surprising as this is human rights law jargon), but when she describes "the responsive state" I think this is an important part of what she has

¹⁴² *Id.* ¶ 41 and 44.

¹⁴³ See, e.g., George Letsas, *The ECHR as A Living Instrument: its Meaning and its Legitimacy*, in *THE EUROPEAN COURT OF HUMAN RIGHTS IN A NATIONAL, EUROPEAN AND GLOBAL CONTEXT* 106-141 (Geir Ulfstein, Andreas Follesdal & Birgit Schlütter eds., 2012).

¹⁴⁴ See also Alice Donald, Jane Gordon & Philip Leach, *The UK and the European Court of Human Rights* 110-112 (Equality and Human Rights Commission, research Report No. 83, 2012) ("the value of a dynamic approach: protection of the vulnerable").

in mind. Indeed, she has argued that the current American antidiscrimination paradigm is not delivering real equality, and that “some more positive state action is required”.¹⁴⁵ This comes close to the way Alastair Mowbray has characterized positive obligations: “the duty upon states to undertake specific affirmative tasks”.¹⁴⁶ Through the concept of positive obligations the Court has achieved some of the things that Fineman advocates a “responsive state” should do. For example, the Court has deployed vulnerability reasoning to lay down positive obligations that bridge the traditional public–private in the domestic violence case of *Opuz v. Turkey*.¹⁴⁷ This is in line with Fineman’s argument that “a particular strength of a vulnerability analysis is its institutional focus that blurs the line between public and private”.¹⁴⁸ In Fineman’s vocabulary, the Court becomes an asset-conferring institution; providing applicants with the assets that give them resilience in the face of vulnerability.¹⁴⁹

To summarize the argument so far: this chapter has identified two ways in which the Court’s vulnerability reasoning is changing the face of its case law. Firstly, both as a matter of caseload-management and as a matter of jurisprudence, vulnerability has developed prioritizing force in Strasbourg. Secondly, vulnerability considerations result in the extension of rights through the doctrine of positive obligations. These two functions combined make for a human rights law that is more responsive to vulnerable and often marginalized people.

V. The Vulnerability of the Court Itself

One of the central tenets of both Fineman’s and Turner’s vulnerability analysis is that social institutions are vulnerable in and of themselves.¹⁵⁰ The Strasbourg Court is no exception, as torrents of criticism leading up to the Brighton Declaration of April 2012 have painfully revealed.¹⁵¹ Withdrawing from the Convention has seriously been discussed in Russia and the UK, because many voters and politicians feel that the Court is unduly infringing on their state’s sovereignty.¹⁵² The former President of the Court,

¹⁴⁵ Fineman, *supra* note 7, at 257 n. 20.

¹⁴⁶ MOWBRAY, *supra* note 136, at 2.

¹⁴⁷ *Opuz v. Turkey*, App. No. 33401/02, 9 June 2009, (2010) 50 E.H.R.R. 28, ¶ 143–4. See *supra* Part II.A.3.

¹⁴⁸ Fineman, *supra* note 16, at 130.

¹⁴⁹ Fineman, *supra* note 1, at 19; Fineman, *supra* note 7, at 272.

¹⁵⁰ See e.g., Fineman, *supra* note 7, at 273; and TURNER, *supra* note 9, at 25–34.

¹⁵¹ For a discussion of the Brighton Declaration, see Laurence R. Helfer, *The Burdens and Benefits of Brighton*, ESIL REFLECTIONS (June 8, 2012), <http://esil-sedi.eu/node/138>.

¹⁵² See, e.g., Stephen Pollard, *Put Abu Qatada on a plane and quit the European Court*, EXPRESS UK, April 20, 2012.

Judge Costa, identified several factors that led to this criticism of the Court: the fight against terrorism; the current financial and socio-economic crisis; the rise of populist movements in Europe; and the rise of Euroscepticism.¹⁵³ Especially in places where these last two developments converge, the Court is vulnerable.¹⁵⁴ Costa notes:

[H]uman rights are becoming less popular, especially seen from the point of view of a Court which treats equally all human beings, including ‘unpopular’ categories of the population: the prisoners, the criminals, the aliens, the asylum seekers, the immigrants, the vagrants, people belonging to minorities.¹⁵⁵

In other words, the Court’s very protection of especially vulnerable and unwanted people renders the Court vulnerable and unwanted itself.¹⁵⁶ At times, the response to the Court is even virulent. The idea of giving prisoners voting rights makes UK Prime Minister Cameron “physically ill”, for example.¹⁵⁷

The Court’s case law in relation to immigrants and asylum seekers, specifically, is provoking a lot of indignation. Marc Bossuyt, President of the Belgian Constitutional Court, has been among those who vocally object to what I have described in the last paragraph: extending certain rights on the basis of vulnerability considerations. He is of the opinion that the ECtHR is on a slippery slope when it comes to asylum seekers, because in his view the Court is continuously lowering the threshold of Article 3.¹⁵⁸ Responding to the ruling in *M.S.S. v. Belgium and Greece*, he has literally asked how many more vulnerable groups we can expect.¹⁵⁹ Bossuyt appeals to what Kenji Yoshino has aptly termed our “pluralism anxiety”; apprehension of “new” kinds of people and “newly visible” kinds of people”.¹⁶⁰ In doing so, Bossuyt re-enacts the very us-against-them discourse that the vulnerability thesis seeks to

¹⁵³ Jean-Paul Costa, *Current Challenges for the European Court of Human Rights: A Raymond and Beverly Sackler Distinguished Lecture in Human Rights* 11-12 (Leiden Law School, Dec. 10, 2011), available at <http://media.leidenuniv.nl/legacy/current-challenges-for-the-european-court-of-human-rights--sackler-lecture-by-costa-doc.pdf>.

¹⁵⁴ *Id.* at 12.

¹⁵⁵ *Id.*

¹⁵⁶ That is not to say that vulnerability and unpopularity necessarily go together: children are especially vulnerable but very popular.

¹⁵⁷ Prime Minister David Cameron, Prime Ministers Questions (Nov. 3, 2010), available at <http://www.youtube.com/watch?v=DjzmvvozHuw>.

¹⁵⁸ Marc Bossuyt, *Judges on Thin Ice: The European Court of Human Rights and the Treatment of Asylum Seekers*, 3 INTER-AMERICAN AND EUROPEAN HUMAN RIGHTS JOURNAL 3 (2010).

¹⁵⁹ Marc Bossuyt, Professor and co-President of the Belgian Constitutional Court, Remarks at the “How to Deal with the Criticism of the European Court of Rights?” Conference (The Hague, 13 April 2012).

¹⁶⁰ Kenji Yoshino, *The New Equal Protection*, 127 HARVARD LAW REVIEW 747, 751 (2011).

challenge. Gear's work enables us to see that this kind of resistance to the ruling in *M.S.S.* is resistance to the idea of replacing the liberal subject with the vulnerable subject in human rights law.

Again, this confirms that the Court's adoption of the vulnerability thesis – even if only partially – renders the Court itself more vulnerable. This diagnosis leads to the conclusion that there are limits to the Court's ability to affect a revolution through its vulnerability reasoning. Fact is that the Court is part of a liberal paradigm.¹⁶¹ Its vulnerability reasoning is therefore not going to do the full extent of the transformative work the supporters of the thesis (including myself) want it to do – mostly because no state would listen anymore.

VI. Conclusion

The ECtHR has clearly not fully embraced the vulnerability thesis. Lourdes Peroni and I have argued that, “while scholars like Turner and Fineman support vulnerability for its potential of capturing the universal, the Court does it for its ability to capture the particular”.¹⁶² Still, I do not believe that these two approaches are necessarily at odds with each other. In my understanding, the Court's focus on specific vulnerability can go hand in hand with universal vulnerability as the (implicit) presupposition of human rights law.¹⁶³

By delineating the Court's case law, this chapter has shown that, when vulnerability is explicitly used in human rights jurisprudence, it functions as a prioritization or as an extension/specification tool. Vulnerability is thus an important judicial concept that helps create a more inclusive human rights law: in other words, a human rights law that is more responsive to the needs of vulnerable people. At the same time, the quiet revolution that I have analysed in this chapter is definitely accompanied by struggle. The work of Fineman and Gear illuminates the fact that the Court struggles between a liberal subject approach and a vulnerability approach. Somewhat ironically, their thesis also helps to see why the Court is attacked by critics in the process. The vulnerability thesis thus predicts its own limits in the

¹⁶¹ Gear, *supra* note 8, at 535-38.

¹⁶² Peroni & Timmer, *supra* note 4, at 5.

¹⁶³ The judges of the ECtHR might intuitively link their work to universal vulnerability. When Lourdes Peroni and I asked a judge about the Court's reasoning, he replied: “All applicants are vulnerable, but some are more vulnerable than others.” In this one sentence, the judge neatly reconciled the apparent tension between universal and particular vulnerability in human rights law.

ECtHR context: as a social institution the Court is vulnerable in and of itself, which is a reality that the Court will have to take seriously in order to survive as a supranational human rights court.

At this point, a sceptic might object that the Court is just taking the old approach of “cautious incrementalism” and that no real revolution takes place at all.¹⁶⁴ In response, I would point out that some of the rulings analysed in this chapter are not “cautious” in the least; think for example of *M.S.S. v. Belgium and Greece*, *Opuz v. Turkey*, *Salduz v. Turkey*, *Yordanova v. Bulgaria* and *M.S. v. UK*. On a more profound level, I wish to connect the Court’s reasoning to what Costas Douzinas has famously claimed: “human rights have only paradoxes to offer”.¹⁶⁵ The same holds true for vulnerability. Ontologically, vulnerability is both particular and universal;¹⁶⁶ as a thesis it concerns both the “is” and the “ought”; and as human rights reasoning it sits between law and critique.¹⁶⁷ In short, the Court’s vulnerability reasoning is partly a genuine shift in discourse (a revolution), and partly a manifestation of the status quo. The title of this chapter is an attempt to capture the paradoxical nature of the role of vulnerability in human rights law.

Revolution or no revolution, vulnerability is a concept to keep an eye on. Vulnerability considerations are at the frontlines of the Court’s case law: this is where it happens, especially in case law concerning migrants. The vulnerability thesis promotes a radical restructuring of societal institutions and also of our way of thinking about the foundations of law. It invites a reimagining of the human of human rights law. “[T]he challenge is to think beyond current ideological constraints”.¹⁶⁸ The vulnerability approach celebrates a shared humanity instead of casting us as antagonists in a bitter fight over limited state resources.¹⁶⁹ Surely, this appeals to the heart of the human rights project.

¹⁶⁴ PETER BARTLETT, OLIVER LEWIS & OLIVER THOROLD, *MENTAL DISABILITY AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 256 (2007).

¹⁶⁵ DOUZINAS, *supra* note 28, at 21.

¹⁶⁶ Cf. BERGOFFEN, *supra* note 30, at 30 (“Our bodies, in establishing the boundaries that separate, distinguish and individuate us from others, are also the source of our connection to them.”).

¹⁶⁷ Cf. GREAR, *supra* note 6, at 169.

¹⁶⁸ Fineman, *supra* note 7, at 274.

¹⁶⁹ See *contra* Dimitris Xenos, *The Human Rights of the Vulnerable*, 13 THE INTERNATIONAL JOURNAL OF HUMAN RIGHTS 591 (2009).

6. Conclusion

I. Introduction

There is much to celebrate in the jurisprudence of the ECtHR as regards the protection of non-dominant groups. Generally speaking I agree with Dia Anagnostou that “the ECtHR has become increasingly receptive to claims from marginalized individuals and minorities”.¹ This thesis has suggested ways in which the Court can strengthen its case law still further. As the first study to present stereotyping and vulnerability as conceptual lenses through which to analyze the jurisprudence on non-dominant groups, it seeks to provide fresh inspiration on how the Strasbourg Court can integrate a more powerful notion of equality in its legal reasoning.

Part II will discuss the key findings as regards the question how the ECtHR can use the concept of stereotype to develop a more transformative version of equality. Part III will do the same as regards the question what potential the concept of vulnerability has to strengthen the ECtHR’s reasoning as regards non-dominant people. Part IV brings the concepts of stereotyping and vulnerability together, and addresses the synergies as well as the tensions between my proposals. Part V concludes this thesis with some reflections on exciting topics for future research.

II. Stereotyping

This part will draw the key findings from Chapters Two and Three together, which allows me to draw some general conclusions about the concept of stereotype in relation to the case law of the Strasbourg Court.

¹ Dia Anagnostou, *The Strasbourg Court, Democracy and the Protection of Marginalised Individuals and Minorities*, in *THE EUROPEAN COURT OF HUMAN RIGHT AND THE RIGHTS OF MARGINALISED INDIVIDUALS AND MINORITIES IN CONTEXT* 1, 19 (Dia Anagnostou & Evangelia Psychogiopoulou eds., 2010).

A) On how to understand stereotypes²

Stereotypes are beliefs about groups of people. This description shows that, contrary to what is often assumed, stereotypes are neither necessarily inaccurate generalizations, nor are they necessarily negative. On the one hand stereotypes fulfill necessary functions in our lives, namely those of information-processing device and self-image booster. But on the other hand stereotypes cause much harm. They confine groups of people to certain roles and positions. Thus stereotypes act as control mechanisms: they limit individuals in their options.³ The effects of stereotypes are manifested in several different domains. First, stereotyping can have recognition effects, meaning that through harmful stereotyping some groups are seen as socially less worthy. Second, it can have distribution effects, in the sense that it can impact on the distribution of material resources. And third, it can cause psychological harm: through what is known as “stereotype threat”⁴ and “covering”,⁵ stereotypes can cause inter alia anxiety, depression and underperformance.⁶

The Strasbourg Court should be aware that stereotypes come in different shapes. The case law of the American Supreme Court provides a particularly rich account of these different shapes.⁷ Based on the U.S. jurisprudence, this thesis distinguishes four kinds of stereotypes. *Role-typing stereotypes* are the first kind. These are assumptions about the proper roles or modes of behavior of people who belong to a certain group. Examples are the notions that women carry the responsibility for child-care⁸ and that Roma are thieves.⁹ Second are *false stereotypes*. False stereotypes are either based on consciously or unconsciously held prejudice *or* they simply have an unsound empirical/statistical basis. Examples of

² REBECCA J. COOK & SIMONE CUSACK, GENDER STEREOTYPING: TRANSNATIONAL LEGAL PERSPECTIVES, Ch 1 (2010) (“Understanding Gender Stereotyping”).

³ Susan T. Fiske, *Controlling Other People: The Impact of Power on Stereotyping*, 48 AMERICAN PSYCHOLOGIST 621, 623 (1993).

⁴ Stereotype threat occurs when we fear that we conform to the negative stereotypes of the social group to which we belong. People experience stereotype threat because they are usually aware of the stereotypes concerning their own group. See generally CLAUDE M. STEELE, WHISTLING VIVALDI AND OTHER CLUES TO HOW STEREOTYPES AFFECT US (2010).

⁵ Covering is a term coined by Kenji Yoshino to denote the process whereby people hide or tone down disfavored identity traits in order to fit into the mainstream. KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS (2006).

⁶ See *supra* Chapter Two.III.

⁷ See *supra* Chapter Three.III.B.

⁸ See, e.g., *Schuler-Zgraggen v. Switzerland*, App. No. 14518/89, 16 Eur. H. R. Rep. 405 (1993); and *Andrie v. Czech Republic*, App. No. 6268/08, 17 February 2011.

⁹ These examples serve as a reminder that role-types – like other stereotypes – can be both positive (women care for children) and negative (Roma are thieves). The stereotype “Roma are thieves” was at issue in *Aksu*.

stereotypes that are based on prejudice are the ideas that Roma are thieves (this notion is therefore both a role-type and a false stereotype) and that immigrants want to leech on social benefits.¹⁰ An example of a stereotype that is false because it lacks a sound empirical basis is the notion that Muslim women are oppressed or, relatedly, that they are pressured to wear headscarves or face covers.¹¹ Thirdly there are *statistical stereotypes*. These are stereotypes that reflect a statistical truth about the group as a whole, but which does not accurately reflect the situation of the individual. In other words, they are largely accurate but overbroad assumptions. An example is the notion that men work more hours in the paid labor force than women.¹² Fourth and final are *prescriptive stereotypes*. Prescriptive stereotypes stipulate a particular form of behavior, or standard of appearance, for certain groups of people. An example is the notion that real rape victims will try to fight off their rapists.¹³ It should be emphasized that many stereotypes will fall under multiple headings at the same time. Take one of the most evident examples, namely the idea that women are homemakers. This is a role-type *and* a statistical stereotype *and* a prescriptive stereotype. Indeed, because of the prescriptive force of such stereotypes, they become a self-fulfilling prophecy: they cause themselves to become true.

This thesis should not be understood as a wholesale attack on stereotyping, nor does it advocate that the Strasbourg Court commence such an attack. To some extent it is inevitable that both individuals and lawmakers rely on generalizations about groups of people. Instead, what this thesis argues is that the Strasbourg Court is faced with the challenge of distinguishing between harmful and allowable stereotypes, and that the Court should vigorously contest harmful stereotyping if it wants to address structural inequality.

B) On the links between stereotyping, equality and discrimination

The thesis has shown that there have been significant developments in the non-discrimination case law of the Strasbourg Court in the past decades: the Court has first embraced formal equality, then the

¹⁰ Cf. *Bah v. United Kingdom*, App. No. 56328/07, 27 September 2011, ¶ 48.

¹¹ *Dahlab v. Switzerland*, App. No. 42393/98, 2001-V Eur. Ct. H.R. 447; and *Leyla Şahin v. Turkey* (GC), App. No. 44774/98, 10 November 2005. Unfortunately, in these cases the Court reinforced this stereotype about Muslim women. See Carolyn Evans, *The "Islamic Scarf" in the European Court of Human Rights*, 7 MELBOURNE JOURNAL OF INTERNATIONAL LAW 52 (2006).

¹² In *Abdulaziz* the UK said something similar, namely that "men were more likely to seek work than women". *Abdulaziz, Cabales, and Balkandali v. United Kingdom* A 94 (1985); 7 Eur. H.R. Rep. 471, ¶ 75.

¹³ Without calling this a stereotype, the Court debunked this myth in *M.C. v. Bulgaria*, App. No. 39272/98, 4 December 2003, ¶ 164.

jurisprudence deepened to include substantive equality, and recently the Court shows signs of being willing to take on board equality as transformation.¹⁴ These different approaches to equality now coexist.

Anti-stereotyping reasoning can be used to simply boost a formal equality approach,¹⁵ but that is not how this thesis envisions the concept. Rather, this thesis argues that the Strasbourg Court should conceive of stereotypes as the covert structures that *underlie* inequality and discrimination. As legally mandated overt discrimination has on many fronts receded in the Council of Europe, the Strasbourg Court should at present focus its energies on contesting and transforming the structures that continue nevertheless to generate inequality: that is what this thesis terms transformative equality. The central tenet of Chapter Two was that stereotypes are both cause and manifestation of the structural disadvantage and discrimination of certain groups of people. The comparative research in Chapter Three allowed me to refine this position: in fact, stereotyping and discrimination are connected in a self-reinforcing invidious cycle. The cycle consists essentially of three components: stereotypes can form a *manifestation* of discrimination, as well as a *rationalization* and a *cause* of discrimination. Stereotypes thus legitimize and sustain unequal power relations: in other words, they help preserve the social status quo.¹⁶ An example of the self-sustaining circle that connects stereotyping to discrimination is found in the case of *Konstantin Markin v. Russia*. In this case the Russian Constitutional Court remarked that it was justified to only provide parental leave to servicewomen firstly due to “the limited participation of women in military service and, secondly, the special social role of women associated with motherhood.”¹⁷ To begin, the stereotype that women do not play major roles in the military is statistically correct: women only constitute approximately 10% in the Russian military and are extremely underrepresented in leadership positions within the military.¹⁸ In the eyes of the Government, this fact then justifies giving parental leave to servicewomen but not servicemen (as giving it too servicemen would have too much of impact on the operational effectiveness of the military). This rule then forces servicewomen to assume care for the children and forces servicemen to continue working; which then

¹⁴ See *supra* Chapter 1.II and III.A; and Chapter 2.II.

¹⁵ Several American legal scholars think that the anti-stereotyping principle can only deliver formal equality. See *supra* Chapter 3.I and III.D.

¹⁶ There is extensive social psychological research that supports this claim: see, e.g., Peter Glick & Susan T. Fiske, *An ambivalent alliance: Hostile and benevolent sexism as complementary justifications for gender inequality*, 56 AMERICAN PSYCHOLOGIST 109 (2001); and John T. Jost & Aaron C. Kay, *Exposure to benevolent sexism and complementary gender stereotypes: Consequences for specific and diffuse forms of system justification*, 88 JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY 498, 499 (2005).

¹⁷ *Konstantin Markin v. Russia* (GC), App. No. 30078/06, 56 Eur. H.R. Rep. 8 (2013), ¶ 34.

¹⁸ See *supra* Chapter 2.V.A.

has the effect of reinforcing the initial gender stereotypes. As this example shows, stereotyping and discrimination are joined in a circle that sustains itself.

C) On the problems with the Strasbourg case law

There are two main problems with the Strasbourg case law in respect of stereotypes.¹⁹ The first and most fundamental is that the Court regularly fails to name stereotypes; the Court often simply disregards whether laws or State practices are based on stereotypes. This is true for cases wherein stereotyping implicitly played a part, as for example in the sex trafficking case of *Rantsev v. Cyprus and Russia*,²⁰ but also for cases where the Government explicitly relied on stereotypes. The result is that any engagement with the issue is foreclosed: the Court's ability to address invidious stereotyping depends on its willingness to identify stereotypes. You cannot change a reality without naming it.²¹

This thesis envisages a more pedagogical role for the Court. There are many judgments in the Strasbourg annals in which the Court found a violation of Article 14 when it was confronted with a discriminatory stereotype, without naming the stereotype as such and explaining what was wrong with it. Take for example the following three cases. The ruling in *Schuler-Zgraggen v. Zwitterland* (1993) concerned a woman who received an invalidity pension following an illness that made her unable to work.²² This pension was discontinued after the birth of her first child. The relevant domestic Court upheld the decision to discontinue the pension by referring to the classic role-type of the woman-homemaker: "the experience of everyday life" is, so the domestic court held, that "many married women go out to work until their first child is born, but give up their jobs for as long as the children need full-time care and upbringing."²³ The inference the domestic Court drew from this stereotype was that "the applicant, even if her health had not been impaired, would have been occupied only as a housewife and mother."²⁴ Ms. Schuler-Zgraggen complained to the Strasbourg Court that these proceedings regarding her pension infringed her right to a fair and non-discriminatory trial (Article 6 in conjunction with Article 14 ECHR). In the case of *Salgueiro da Silva Mouta v. Portugal* (1999) the applicant complained that his ex-wife had been awarded parental responsibility of their child because he was

¹⁹ See *supra* Chapter 3.II.D.

²⁰ *Rantsev v. Cyprus and Russia*, App. No. 25965/04, 7 January 2010; see *supra* Chapter 2.V.B.

²¹ Cf. CATHARINE MACKINNON, *WOMEN'S LIVES, MEN'S LAWS* 89 (2005).

²² *Schuler-Zgraggen v. Switzerland*, App. No. 14518/89, 16 Eur. H. R. Rep. 405 (1993).

²³ *Id.* ¶ 29.

²⁴ *Id.*

homosexual and living with another man.²⁵ The Lisbon Court of Appeal had ruled that it was not in the best interest of the child to stay with her father, because homosexuality is “an abnormality”; the applicant “had definitively left the marital home to go and live with a boyfriend, a decision which is not normal according to common criteria”; and the child should live in “a traditional Portuguese family, which is certainly not the set-up her father has decided to enter into”.²⁶ The Court of Appeal thus imprints the false stereotype that homosexuals cannot be good fathers and simultaneously the prescriptive stereotype that proper fathers should not live with their male partners. *Zarb Adami v. Malta* (2006) concerned a man who complained under Article 4 (the prohibition on forced or compulsory labor) in conjunction with Article 14 that jury service was imposed on him in a discriminatory manner, because the burden of jury service *de facto* fell predominantly on men.²⁷ The Government explained this practice by a combination of statistical and false stereotypes: namely the fact that “jurors were chosen from the part of the population which was active in the economy and professional life”; the fact that the rules governing jury service allowed exemptions for people who had to take care of their family and this applied more to women than to men; and that “‘for cultural reasons’, defence lawyers might have had a tendency to challenge female jurors” (thus implying that women were often held to be unsuitable jurors).²⁸ What these three cases have in common is that the Court did find a violation of Article 14, but that the sum of the Court’s reasoning consisted of the remark that the Governments’ arguments did not constitute valid reasons.²⁹ The Court does not permit the stereotypes, but it does not name them either. Such brief reasoning does not teach the Member States anything about the harm of stereotypes. The Court could and should have a much stronger educational role in this field.

The second problem with the jurisprudence is that the Court but seldom analyzes stereotyping as a inequality/discrimination issue. If it does touch upon stereotypes, the Court often does so under one of the freestanding Convention articles (frequently Article 8).³⁰ While it is certainly true that stereotyping can infringe on one of the other rights laid down in the Convention, it is important that the Court frames stereotyping as an Article 14 matter. The essence of the wrong of stereotypes is that they justify and

²⁵ *Salgueiro da Silva Mouta v. Portugal*, App. No. 33290/96, 21 December 1999.

²⁶ *Id.* ¶ 14.

²⁷ *Zarb Adami v. Malta*, App. No. 17209/02, 44 Eur. H.R. Rep. 3 (2006).

²⁸ *Id.* ¶ 81.

²⁹ *Schuler-Zraggen v. Switzerland*, App. No. 14518/89, 16 Eur. H. R. Rep. 405 (1993), ¶ 67; *Salgueiro da Silva Mouta v. Portugal*, App. No. 33290/96, 21 December 1999, ¶ 35-36; *Zarb Adami v. Malta*, App. No. 17209/02, 44 Eur. H.R. Rep. 3, ¶ 82 (2006).

³⁰ See *supra* Chapter 3.II.D. This is of a piece with the Court’s habit to omit an analysis of Article 14 if it has already found another violation of the Convention. See *supra* Chapter 1.II.C.

perpetuate inequality and discrimination. Stereotypes trap groups of people in the kinds of self-sustaining discriminatory circle that the last section described; thus, stereotypes are a structural cause of inequality. The Court's legal reasoning should acknowledge this. To be sure, on the level of the individual applicant stereotyping can impact the right to private life; the right to education – indeed, arguably all the substantive rights in the Convention. But stereotypes are beliefs about *groups* of people: as a result, stereotyping is a social experience, not just an individual experience. The Court loses that group-based, wider social justice dimension if it does not apply a discrimination analysis. The stereotype concept's ability to diagnose and contest the structural causes of inequality depends on its first being framed as an inequality issue. In other words, if the Court does not address stereotyping as an equality issue, the concept loses its transformative potential.

D) On the importance of considering other jurisdictions

As the concept of stereotyping is still very fresh and underdeveloped in the case law of the ECtHR, this thesis has turned to other jurisdictions for inspiration on how the concept can be deployed. It seems that the Strasbourg Court can learn a lot in terms of good legal reasoning about stereotypes from other jurisdictions. To start the Court could turn to other human rights bodies. The CEDAW Committee in particular has developed an insightful interpretation of the stereotyping concept in the field of gender equality.³¹ Article 5(a) CEDAW forms the premier legal basis for the obligation to address gender stereotyping. Importantly, all States of the Council of Europe are party to CEDAW. The CEDAW Committee is by no means alone, however, in attempting to address the harm of stereotypes. The Inter-American Court, for instance, has also handed down several judgments in which it addresses stereotypes head on.³² The European Court of Justice, too, has addressed stereotypes.³³

As regards the national level, Chapter Three has argued that the Strasbourg Court can learn a lot from the lines of reasoning that the American and Canadian Supreme Courts have developed about stereotypes in their equal protection jurisprudence.³⁴ Some core lessons that the ECtHR should take away from the courts across the Atlantic are that stereotypes take different shapes and that statistical and prescriptive stereotypes can also be invidious (as was just discussed); that stereotyping is connected

³¹ See *supra* Chapter 1.III.A; and Chapter 2.III.

³² See, e.g., *Atala Riffo and Daughters v. Chile*, Inter-Am. Ct. H.R. (Feb. 24, 2012); *Artavia Murillo et. al. ("in vitro fertilization") v. Costa Rica*, Inter-Am. Ct. H.R., 28 November 2012.

³³ See, e.g., ECJ, Case C-104/09, *Roca-Álvarez v. Sesa Start España ETT SA* (2010), ¶ 36.

³⁴ See *supra* Chapter 3.V.

to discrimination in a self-reinforcing circle (as was also just discussed); and that in distinguishing whether a stereotype is invidious, context is everything (see next section for discussion). The South-African Constitutional Court has also extensively used the concept of stereotype in its legal reasoning.³⁵ Regrettably, this thesis could not provide a comparison with all these jurisdictions; the jurisdictions that were not addressed would provide interesting materials for future research on the concept of stereotypes.

E) On the integration of an (anti-) stereotyping approach in the legal reasoning of the ECtHR

Chapters Two and Three both contain suggestions how the Strasbourg Court might integrate an anti-stereotyping approach in its legal reasoning.³⁶ There are commonalities as well as slight differences between these proposals. This section will therefore construct a synthesis of these proposals.

The most basic point is that the Strasbourg Court will have to start to name stereotypes and, in so doing, assess whether a particular instance of stereotyping is harmful or not. The Strasbourg Court faces the double challenge of detecting stereotypes and then distinguishing between permissible generalizations and harmful stereotypes. For many reasons, this is a difficult enterprise: stereotypes might be so deeply embedded and widely accepted in European society that judges will not even notice them,³⁷ seemingly positive or benevolent stereotypes might also turn out to be harmful,³⁸ and the harmfulness of stereotypes might be ambiguous. The only way the Court can detect stereotypes and assess whether they are harmful is, in my opinion, by carrying out a contextual analysis. Here are some contextual factors that the Court should take into account, most of which are familiar from the Canadian case law discussed in Chapter Three.³⁹

○ *Historical context/pre-existing disadvantage*

³⁵ See, e.g., *President of the Republic of South Africa and Another v. Hugo*, 1997 (6) BCLR 708 (S. Afr.). For discussion see, e.g., Mark S. Kende, *Gender Stereotypes in South African and American Constitutional Law: The Advantages of a Pragmatic Approach to Equality and Transformation*, 117 SOUTH AFRICAN LAW JOURNAL 745 (2000).

³⁶ See specifically *supra* Chapter 2.IV and Chapter 3.V.

³⁷ See *supra* Chapter 2.IV.B.

³⁸ See *supra* Chapter 1.III.B.

³⁹ The four contextual factors that are proposed here are the four factors from the seminal *Law v. Canada* case, except that the fourth *Law*-factor – “the nature of the interest affected” – is replaced here by the factor called “effects”. See *Law v. Canada*, [1999] 1 S.C.R. 497, ¶ 72-75 (Can.). For discussion and references see *supra* Chapter 3.IV.C.

First of all, a contextual analysis will put the impugned rule or practice in a historical context. Does the applicant belong to a group that has suffered particular discrimination in the past? Does the applicant or the group that she belongs to suffer from pre-existing disadvantage? In what kind of socio-political context was the law/practice in question developed? Was the group concerned (e.g., women generally, specific groups of women in particular, people with a mental disability, homosexuals) formerly prevented from enjoying the particular right at issue? As the Court has already done in numerous judgments, for example judgments concerning Roma, it can rely on the materials from other international human rights bodies and NGO's to establish whether the applicant's group suffers from pre-existing disadvantage.⁴⁰ The concept of group vulnerability due to a history of discrimination, which has been extensively discussed in Chapter Four on the basis of such cases as *D.H. and Others v. Czech Republic* and *Kiyutin v. Russia*, is also well-suited to this aspect of the contextual analysis that serves to determine whether a stereotype is harmful.⁴¹

- *Effects*

What are the effects of the challenged rule or practice on both the applicant's group and the applicant individually? What kind of harm is caused to whom? The Court should be aware that stereotypes can have harmful recognition, distribution and psychological effects and take these various dimensions of harm into account. The Court should also be aware that the harms of stereotyping can be felt by more than just one group. Take for example again the case of *Zarb Adami v. Malta*, concerning the *de facto* discrimination in the allotment of jury service, as a result of which "only a negligible percentage of women were called to serve as jurors."⁴² The Government explained this situation by enumerating a number of stereotypes about women: that they do not much participate in socio-economic life and that they often have stay at home to care for family members. Using a contextual anti-stereotyping approach, the Court should have made clear that both men and women feel the unfavourable effects from these stereotypes. The applicant, a man, complains of maldistribution: the argument is that he as a man had to carry an annoying civic burden that women did not have to carry. It is almost implied that women profit from this situation. But that leaves out of the picture how these stereotypes have the effect of relegating women to a position outside the civic domain and inside the home. In other words,

⁴⁰ *D.H. and Others v. the Czech Republic* (GC), App. No. 57325/00, 47 Eur. H. R. Rep. 3, ¶182 (2007).

⁴¹ See also *infra* Part IV.B.

⁴² *Zarb Adami v. Malta*, App. No. 17209/02, 44 Eur. H.R. Rep. 3, ¶ 75 (2006).

the stereotypes that cause jury service to fall almost exclusively on men, have a harmful distribution effect on men and a harmful recognition effect on women.

○ *Fit*⁴³

To what extent, the Court might ask, does the impugned unequal treatment correspond to the reality of the applicant's group? Put differently, if a stereotype is being used, to what extent is the stereotype accurate? Statistically accurate stereotypes might still be harmful, but the degree of accuracy is nevertheless a factor to consider. The idea of fit has particular traction in cases that concern formal legal classifications and bright line rules. One example is *Alajos Kiss v. Hungary*, which concerned the automatic disenfranchisement of people with a mental disability who have been appointed a legal guardian.⁴⁴ This rule was based on the stereotype that people with a mental disability are incapable of making informed political choices.⁴⁵ This is probably a highly inaccurate stereotype; in any event, the Government did not substantiate this claim. In other words, the fit between the stereotype and the actual capacities of people with mental disability is weak. Another ruling that concerns a salient question of "fit" is the well-known case of *Pretty v. UK* (2002). Ms. Pretty, who had a terrible neuro-degenerative disease and who was facing an undignified and painful certain death, wanted her husband to assist her in committing suicide as she was unable to do that by herself. The Government did not allow assisted suicide and based this refusal on the stereotype that terminally ill people are vulnerable to abuse and therefore in need of protection. Pretty, however, strongly emphasized that she was *not* vulnerable nor in need of protection.⁴⁶ How strong is the fit here between the stereotype and the reality of applicants who are terminally ill? The Court recognized that Pretty was not vulnerable,⁴⁷ but assumed that the fit was still a relatively strong one.⁴⁸ Yet another example is a case that is currently pending before the Grand Chamber; *S.A.S. v. France*, concerning the French "burqa ban".⁴⁹ When the Court would investigate to what extent the ban fits the reality of women wearing the burqa, it would come to

⁴³ This is a long-contested heuristic of equal protection law. Too much emphasis on fit dilutes the inquiry into a purely formal debate about line-drawing. For discussion, see, e.g., Owen Fiss, *Groups and the Equal Protection Clause*, 5 PHILOSOPHY & PUBLIC AFFAIRS 107, 109-117 (1976).

⁴⁴ *Alajos Kiss v. Hungary*, App. No. 38832/06, 20 May 2010.

⁴⁵ *Id.* ¶ 26.

⁴⁶ *Pretty v. the United Kingdom*, App. No. 2346/02, 2002-III, ¶ 45. See also ¶ 46: "The applicant rejected as offensive the assertion of the Government that all those who were terminally ill or disabled and contemplating suicide were by definition vulnerable and that a blanket ban was necessary so as to protect them."

⁴⁷ *Id.* ¶ 73

⁴⁸ *Id.* ¶ 74 ("Doubtless the condition of terminally ill individuals will vary. But many will be vulnerable and it is the vulnerability of the class which provides the rationale for the law in question.")

⁴⁹ *S.A.S. v. France*, App. No. 43835/11.

the conclusion that the ban is largely based on false stereotypes.⁵⁰ The stereotypes underlying the ban are namely that women who wear the face veil are commonly forced or pressured to do so, and that women who wear the face veil are not able or do not wish to interact with others.⁵¹ Empirical research amongst women who wear the face veil has established that these assumptions are false.⁵²

○ *Ameliorative purpose*

If the Court finds that an impugned law or practice is based on a stereotype, it could examine whether the law has an ameliorative purpose. Was the law designed to improve the position of a disadvantaged group? If so, this might indicate that the stereotyping was permissible. This requires a careful analysis, since Governments very easily and often claim that their laws serve an ameliorative purpose. So, for example, the Turkish Government argued in *Ünal Tekeli v. Turkey* (2004) that a law prohibiting married women from using maiden name protects their disadvantaged position in the family.⁵³ This patriarchal rule did clearly no such thing; on the contrary, it was part of a system of rules which ensured women's subordinated position within the family. *S.A.S. v. France* is an example of a more ambiguous case. To the extent that the French authorities have instituted the burqa ban to protect Muslim women, it could be argued that the ban has an ameliorative purpose. On the other hand, the ban can also be viewed as anti-Islam. Some measures, however, do genuinely have an ameliorative purpose. *Pretty* is again an example: the stereotype that "terminally ill people are vulnerable to abuse" was truly deployed here with the idea of protecting a disadvantaged group.

This is not to suggest that the Court should always go through this whole list of factors.⁵⁴ The first two factors – historical context and (current) effects – are in my view most important, because they will be useful in practically every case. Which contextual factors and questions are relevant ultimately depends on the circumstances of the case however. These factors are merely presented here as being indicative of the kind of analysis the Court should undertake to distinguish stereotypes and assess their harm.

⁵⁰ See *Written submissions by the Human Rights Centre of Ghent University in the case of S.A.S. v. France*, App. No. 43835/11 (on file with author).

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Ünal Tekeli v. Turkey*, App. No. No.29865/96, 16 November 2004, 42 Eur. H.R. Rep. 53 (2006), ¶ 16 and 46.

⁵⁴ The Canadian experience is that if these factors are applied too rigidly, they will obstruct rather than facilitate a contextual equality analysis. See *generally* MAKING EQUALITY RIGHTS REAL, MAKING EQUALITY RIGHTS REAL: SECURING SUBSTANTIVE EQUALITY UNDER THE CHARTER (Fay Faraday, Margaret Denike & M. Kate Stephenson eds., 2009)

My argument throughout has been that the Court should start seeing stereotyping as a discrimination issue. This raises the question how the Court should incorporate the above mentioned contextual analysis in its review of Article 14 of the Convention (in conjunction with another provision from the Convention of course). In essence the Court's analysis of the prohibition on discrimination proceeds in two steps: (i) is there a difference in treatment between persons in otherwise similar situations; and if so, (ii) is this difference justified? These questions relate respectively to the scope and to the justifications stage of the analysis. Correspondingly, the Strasbourg Court can take two routes as regards the incorporation of the contextual analysis which is aimed at identifying harmful stereotypes: it can do this either under the scope of Article 14, or under the proportionality analysis of Article 14.⁵⁵

The advantage of naming stereotypes already in the scope-stage of the Article 14 analysis is that it helps the Court to recognize that stereotyping is a discrimination issue. If reasoning about stereotypes remains confined to the second stage of the analysis, many cases – such as notably *Aksu v. Turkey*⁵⁶ – will not pass the Article 14 gate. In order to perform a stereotype-sensitive scope analysis, however, the Court will have to make some adjustments in its jurisprudence. First of all, a rigid *comparability* test is not suited to the reality of stereotyping, which is why Chapter Two suggests – based on work of Janneke Gerards – that the Court had better employ a disadvantage test.⁵⁷ This means that, in order to establish that there is a case of unequal treatment, the Court does not compare whether persons in similar situations have been treated differently, but whether treatment disadvantages some persons in particular. The other jurisprudential feature that has hampered the Court in detecting unequal treatment is the *intent* heuristic as evidence of such treatment. The Court has frequently made the mistake of relying on intent in cases that concern invidious stereotyping. In *V.C. v. Slovakia*, for example, a case about the involuntary and unnecessary sterilization of a Roma woman, the Court notes that “the objective evidence is not sufficiently strong in itself to convince the Court that it was part of an organised policy or that the hospital staff’s conduct was intentionally racially motivated.”⁵⁸ The Court then proceeds to declare that it is not necessary to examine whether Article 14 was violated. The Court’s

⁵⁵ See *supra* Chapter 3.V.D.

⁵⁶ *Aksu v. Turkey* (GC), App. Nos. 4149/04; 41029/04, 15 March 2012. See *supra* Chapter 3.II.D.

⁵⁷ See *supra* Chapter 2.IV.C.iii.

⁵⁸ *V.C. v. Slovakia*, App. No. 18968/07, 8 November 2011, ¶ 177; and similarly *I.G. and Others v. Slovakia*, App. No. 15966/04, 13 November 2012, ¶ 165, and *N.B. v. Slovakia*, App. No. 29518/10, 12 June 2012, ¶ 121 (both also about the involuntary sterilization of Roma women). Other cases where the Court refers to intent include *Aksu v. Turkey* (GC), App. Nos. 4149/04; 41029/04, 15 March 2012, ¶ at 45.

focus on intent is misconceived in *V.C.* and other cases that concern stereotyping,⁵⁹ because stereotyping often occurs unconsciously and automatically.⁶⁰ This is not to imply that the comparator and the intent heuristics are constant fixtures in the Court's Article 14 case law; the Court by no means always refers to these concepts. But they have certainly prevented several stereotyping cases from passing the Article 14 gates, especially cases that concern more covert forms of unequal treatment. The misguided reliance on comparability and intent explains, for example, why – within the space of one week – the case of *Konstantin Markin v. Russia* succeeded to fall within the scope of Article 14, whereas the case of *Aksu v. Turkey* failed.

The advantage, on the other hand, of incorporating an analysis of the invidiousness of stereotypes under the second (justifications) step of Article 14 review is that this seems to fit better with the Court's existing case law. The contextual factors which were just mentioned (historical context; effects; fit; and ameliorative purpose) lend themselves well to the analysis of proportionality in the strict sense, namely balancing. This route could deliver fine anti-stereotyping reasoning, as long as the ECtHR recognizes that stereotyping gives rise to an Article 14 claim and examines stereotypes and their invidiousness carefully.

F) On the margin of appreciation from an (anti-)stereotyping perspective

It is by now a commonplace to say that the margin of appreciation doctrine is opaque and confusing. The extensive legal literature about this doctrine has established that there are actually different kinds of margins of appreciation in the jurisprudence of the ECtHR.⁶¹ At the core of the margin of appreciation lies the idea that the Court should show deference.⁶² Jan Kratochvil rightly points out that this is still very abstract, the question being: deferent with regards to what?⁶³ The first answer is that the margin of

⁵⁹ There is abundant legal literature on this topic in the U.S., as a response to the American courts' premise that discrimination occurs intentionally. See, e.g., Charles R. Lawrence, *The Id the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STANFORD LAW REVIEW 317 (1987); and Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STANFORD LAW REVIEW 1161 (1995).

⁶⁰ See, e.g., Susan T. Fiske & Ann Marie Russell, *Cognitive Processes*, in THE SAGE HANDBOOK OF PREJUDICE, STEREOTYPING AND DISCRIMINATION 115, 117-119 (John F. Dovidio et al. eds., 2010).

⁶¹ See, e.g., Jan Kratochvil, *The Inflation of the Margin of Appreciation by the European Court of Human Rights*, 29 NETHERLANDS QUARTERLY OF HUMAN RIGHTS 324 (2011); and George Letsas, *Two Concepts of the Margin of Appreciation*, 26 OXFORD JOURNAL OF LEGAL STUDIES 705 (2006).

⁶² See, e.g., Kratochvil, *supra* note 61, at 327.

⁶³ *Id.*

appreciation is a doctrine which states that the Court should maintain a certain deference toward the judgment of the domestic authorities when it comes to applying the norms of the Convention to a certain set of facts.⁶⁴ In this sense, the margin of appreciation is a doctrine that determines the strictness of review of the Court.⁶⁵

The claim of the last section, namely that the Court ought to examine stereotypes and their harm carefully by carrying out a contextual assessment, might be taken to imply that there is little room for this type of margin of appreciation within an (anti-)stereotyping approach. Especially if the Court takes the second route that was just suggested (of analyzing the invidiousness of stereotypes under the proportionality analysis of Article 14), a “careful analysis” could be taken to mean that the Court should show little deference in its review of the domestic decision. But that is going too fast: a careful analysis, meaning one that names the problem of stereotyping, is not necessarily an analysis that lacks in deference. In other words, it is not true that an (anti-)stereotyping approach automatically calls for a narrow margin of appreciation. The anti-stereotyping approach dictates no such outcome; it only calls for better legal reasoning. Particularly when a stereotype is ambiguous – when, on balance, it is not quite clear how much harm a stereotype does – as for example in the *Pretty* case which was just discussed, the Court is well advised to leave the matter in the hands of the domestic authorities. However, in areas where the Court has already announced that it will apply a very weighty reasons test, as with discrimination on the grounds of sex or sexual orientation, it is submitted that the Court should be consistent and really perform a strict scrutiny.⁶⁶

On the topic of strict scrutiny it should be added that, from an (anti)stereotyping perspective, it seems that some of the factors that the Court currently uses to determine the width of the margin of appreciation are more suitable than others.⁶⁷ A factor that currently⁶⁸ narrows the margin of appreciation in the Courts jurisprudence which strokes well with an anti-stereotyping agenda is group vulnerability due to a history of discrimination. This and other synergies between anti-stereotyping and

⁶⁴ Cf. *id.* at 330.

⁶⁵ This is what Letsas calls “the structural concept of the margin of appreciation” and Kratochvil calls “the margin of appreciation in norm application”. See also ODDNÝ MJÖLL ANARDÓTTIR, EQUALITY AND NON-DISCRIMINATION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS 58-67 (2003).

⁶⁶ See *supra* Chapter 2.IV.C.ii.

⁶⁷ See generally about the factors that determine the width of the margin of appreciation, e.g., Eva Brems, *The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights*, 56 ZEITSCHRIFT FÜR AUSLÄNDISCHES OFFENTLICHES RECHT UND VOLKRECHT 240 (1996); more specifically about the factors that determine the width of the margin in Article 14 cases see *supra* Chapter 1.II.C.

⁶⁸ See *supra* Chapter 4.IV.B.

vulnerability reasoning will be explored in part IV of this Chapter.⁶⁹ On the other hand, two factors that jar with an (anti-)stereotyping perspective are consensus and moral/social sensitivity. The Court has used the argument of consensus amongst Member States both to widen and to narrow the margin of appreciation,⁷⁰ but either way it is an ill-fit with a concern about stereotyping. The problem is that the degree of consensus is not a good predictor of the harmfulness of a stereotype. In fact, quite the reverse: the more deeply embedded a stereotype is, the more consensus there will be about it. Thus some of the most pernicious and lasting stereotypes – such as the man-breadwinner/woman-homemaker notion – enjoy great support in Europe.⁷¹ This means that by deploying the consensus factor to widen the margin of appreciation, the Court risks reinforcing some of the most powerful – because widely shared – harmful stereotypes. And something similar applies to the social/moral sensitivity factor. The Court has in many cases indicated that “particularly where the case raises sensitive moral or ethical issues, the margin will be wider”.⁷² Here the problem is that many of these sensitive issues concern culturally preordained roles, such as the idea that women ought to be mothers, which is of relevance for example in abortion cases;⁷³ or the idea that homosexuals do not have such real and enduring relationships as heterosexuals, which is relevant in the discussion about same-sex marriage.⁷⁴ To put it differently: stereotypes (both harmful and acceptable ones) are rooted in culture. If the Court declines to closely review culturally sensitive cases, it will let many harmful stereotypes pass by.

Ultimately, from the perspective of an (anti-)stereotyping approach, the margin of appreciation could lay in the “choice of means”.⁷⁵ Council of Europe Member States ought to be able to show that they are aware of the perniciousness of stereotyping and that they are addressing the problem to the best of their ability. What kind of measures States take to address stereotyping, falls within their margin of appreciation.

⁶⁹ See *infra* Chapter 6.IV.B.

⁷⁰ See *generally* about consensus *supra* Chapter 1.II.C note 109 and the literature mentioned there.

⁷¹ This is precisely why Margot Young is extremely critical of the stereotype concept. She writes: “the more powerful (and damaging) a stereotype, the more entrenched it may be and the more difficult it will be to see it as false”. Margot Young, *Unequal to the Task: ‘Kapp’ing the Substantive Potential of Section 15*, 50 SUPREME COURT LAW REVIEW 183, 208 (2010).

⁷² Van der Heijden v. Netherlands (GC), App. No. 42857/05, 3 April 2012, ¶ 60. See also, e.g., A, B and C v. Ireland (GC), App. No. 25579/05, 16 December 2010, ¶ 232; and S.H. and Others v. Austria (GC), App. No. 57813/00, 3 November 2011, ¶ 94.

⁷³ See, e.g., A, B and C v. Ireland (GC), App. No. 25579/05, 16 December 2010.

⁷⁴ Cf. Schalk and Kopf v. Austria, App. No. 30141/04, 24 June 2010, ¶ 92-94 (where the Court explicitly holds that same-sex couples can also enjoy “family life” in the sense of Article 8 ECHR).

⁷⁵ I thank my supervisor, Professor Eva Brems, for this suggestion. See *generally* about “choice of means”, Kratochvil, *supra* note 61, at 333-334.

G) On the feasibility of my proposals in light of the Court's institutional reality

This thesis envisages a more active role for the Court on a topic that has so far largely escaped the Court's explicit attention; a topic, moreover, that many might consider outside the purview of the judiciary. But is stereotyping really best addressed outside of the legal arena? Harmful stereotyping is a widespread and diffuse problem, arguably impacting all spheres of life and society. It is submitted that combating such stereotyping requires a wide range of both legal and non-legal measures,⁷⁶ the latter predominating. Non-legal measures will be required in fields such as civil society,⁷⁷ education,⁷⁸ and media.⁷⁹ Legal measures can perform but a small part in the battle against suffocating stereotypes that keep people in assigned places. Within the category of legal measures, an anti-stereotype approach through human rights law generally – and ECtHR jurisprudence even more specifically – is but a small component.⁸⁰ In other words, the role that this thesis envisages for the Strasbourg Court in the broader project of combating stereotypes is a limited one: the Strasbourg Court is only one little radar in a much bigger clockwork. In that sense, I do not think that the proposals this thesis has put forward as regards the integration of an anti-stereotyping perspective in the Court's legal reasoning, overtax the Court's strength.

Undeniably, however, there is a tension between the (anti-)stereotyping perspective and traditional values. Indeed, that is part of the point: the Court should not unthinkingly accept dominant ideas about group identities. Not surprisingly, the (anti-)stereotyping approach has been the target of some "traditionalist critique", notably from the President of the Russian Constitutional Court, Valery

⁷⁶ From a social psychology perspective, see, e.g., DAVID J. SCHNEIDER, *THE PSYCHOLOGY OF STEREOTYPING* 376-433 (2004) ("Change of Stereotypes and Prejudice"); *STEREOTYPES AND PREJUDICE: ESSENTIAL READINGS*, Part 7 (Charles Stangor ed., 2000) ("Improving Intergroup Perceptions and Behavior").

⁷⁷ See, e.g. www.dosta.org for an example of a campaign against the stereotyping of Roma.

⁷⁸ See, e.g., "Study on combating gender stereotypes in education", Gender Equality and Human Dignity Department, Council of Europe, Strasbourg, 2 December 2011, available at: http://www.coe.int/t/dghl/standardsetting/equality/03themes/gendermainstreaming/CDEG_2011_16_GS_education_en.pdf

⁷⁹ See for example the documentary "*Miss Representation*", concerning the misrepresentation of women in the media, available at: <http://www.missrepresentation.org/>.

⁸⁰ Indeed, the Council of Europe seems increasingly aware that stereotyping can form a human rights issue and has taken several measures to address the issue: see, e.g., Parliamentary Assembly, Recommendation 1931 (2010), "Combating sexist stereotypes in the media" (2010).

Zorkin, who has vehemently objected against the Chamber judgment in *Konstantin Markin v. Russia*.⁸¹ According to this type of critique, when the Court adopts an anti-stereotyping approach, it misunderstands the sociological reality in many European countries.⁸² Or, in other words, the Court would indulge in too much judicial activism if it were to integrate an anti-stereotyping perspective in its legal reasoning. This kind of critique does erode the Court's legitimacy, but at the same time the damage should not be overestimated as the Court's position as a quasi-constitutional Court of Europe in the field of human rights makes it inevitable that it receives this kind of criticism.⁸³ The Court is doomed to navigate between Scylla and Charybdis: on the one hand the Court risks incurring censure for meddling too deeply in the culture and social affairs of the Member States, and on the other hand the Court risks incurring censure for being a toothless tiger that is incapable of addressing the persistent problems affecting millions of people in the Council of Europe.

Ultimately, the Court will have to convince through the quality of its legal reasoning. The argument that the Court should name stereotypes and carefully examine their harm, and then contest harmful stereotypes under the Convention's non-discrimination provision, is a plea for a more vigorous response to the inequalities that still plague the countries of the Council of Europe. Surely the European Court of Human Rights acts within bounds by acting against inequality.

III. Vulnerability

This part will draw the key findings from Chapters Four and Five together, regarding the concept of vulnerability in relation to the case law of the Strasbourg Court.

A) On how to understand vulnerability

⁸¹ That judgment had taken issue with the notion that mothers have a special role to fulfill in the upbringing of children. Amongst other things, Zorkin wrote in a newspaper article that contemporary psychology defends this notion. Furthermore, according to Zorkin, the Court's preoccupation with the rights of homosexuals, a minority which "violates cultural, moral and religious code[s]", is taking "grotesque forms". Lauri Mälksoo, *Markin v. Russia*, 106 THE AMERICAN JOURNAL OF INTERNATIONAL LAW 836, 839-841 (2012).

⁸² In his case note about *Konstantin Markin*, Professor Mälksoo claimed: "In some ways, certain ultraprogressive opinions expressed in European human rights discourse—for example, in the *Markin* case experts from Ghent University maintained that it was a mere "gender stereotype" to contend that fighting and military service were for men rather than for women—do not correspond to sociological realities in European countries". *Id.* at 841-842.

⁸³ See *supra* about the Court's institutional position generally Chapter 1.IV.B. I do not think that an anti-stereotyping approach gets the Court in any hotter waters than it already is, in areas such as asylum, the rights of (alleged) terrorists, or prisoner's rights.

Vulnerability is a concept that consists of paradoxes. To start, it is both a universal human condition, yet it is experienced by everyone particularly. Everyone is vulnerable, but some people are rendered more vulnerable than others. Next, vulnerability entails both positive and negative features: it connotes a susceptibility to harm and injury, but is also generative of empathy, relationships and institutions. Similarly, vulnerability can invite empathy and care, but also violence and abuse. Lastly, as a thesis, vulnerability straddles both the realms of “is” and “ought”: it provides a descriptive diagnosis of the human condition and a prescription on the proper response to this condition. All these sides of vulnerability (paradoxical as they may seem) need to be recognized in order to release the concept’s potential to strengthen the legal reasoning of the Strasbourg Court.

B) On vulnerability and human rights subjectivity

At the heart of Chapters Four and Five are questions of human rights subjectivity. The underlying question in Chapter Four is this: is human rights law so construed as to protect the most vulnerable people?⁸⁴ The underlying question in Chapter Five is even more fundamental: does human rights law protect vulnerable people? Or, in other words, is the human of human rights vulnerable? It is tempting to either answer “yes of course, human rights law protects everybody”, or to narrate human rights as a progress-story in which human rights exist along a continuum that progressively includes vulnerable groups.⁸⁵ This thesis cautions against too easily adopting these sanguine views: the relationship between vulnerability and human rights is complex and contested.

Drawing on the work of Anna Grear and other critics, this thesis recognizes that there is an ambivalence at the core of human rights. The history of human rights law yields two different stories: one story adopts a liberal quasi-disembodied autonomous subject and the other story adopts a human embodied vulnerable subject as the central figure of human rights. The liberal story is a very powerful one in human rights law (including in European human rights Convention law⁸⁶) and as a result the

⁸⁴ See *supra* Chapter 4.II.C.

⁸⁵ Cf. Michael Ashley Stein, *Disability Human Rights*, 95 CALIFORNIA LAW REVIEW 75, 114 (2007) (“One way to view human rights is to consider them existing along a continuum that progressively extends towards marginalized groups.”).

⁸⁶ For an influential defense of the claim that the Convention should be interpreted in line with liberal values see: GEORGE LETSAS, *A THEORY OF INTERPRETATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (2007). For interpretations that contest the liberal account, see MARIE-BÉNÉDICTE DEMBOUR, *WHO BELIEVES IN HUMAN RIGHTS? REFLECTIONS ON THE EUROPEAN CONVENTION* (2006)

human rights universal is often premised on a mythical *invulnerable* subject, who is male, white, rational, autonomous etc.⁸⁷ As a result, people who do not fit this archetype have often found great difficulty in obtaining protection through human rights law. On the other hand, human rights are undeniably – and perhaps par excellence – an emancipatory tool for diverse, embodied, and vulnerable people. To this day, human rights law struggles with these paradoxical inheritances.⁸⁸

C) On the applicants whom the Court has referred to as ‘vulnerable’

Chapter Five has delineated which applicants the Court considers vulnerable and why.⁸⁹ In the first place, there are applicants that the Court considers inherently vulnerable, namely children and people with a mental disability. Secondly, there are applicants who the Court considers vulnerable because they fall under State control; these are persons in detention. Thirdly, the Court considers some applicants vulnerable due to gendered power differences, namely women in domestic violence or precarious reproductive health situations. Fourth, some applicants are deemed vulnerable due to legal power imbalances, namely people who are accused of a crime and persons who are deprived of legal capacity. Fifth, the Court has also in some situations referred to people who espouse unpopular views as vulnerable; these are cases of journalists and demonstrators. Sixth, the Court sometimes recognizes that people are rendered vulnerable due to their forced migration, namely asylum seekers. Seventh, the Court has spoken of vulnerability due to group-membership, this regards Roma, people with impaired health, and (to some extent) asylum seekers. The cases about group vulnerability have been extensively discussed in Chapter Four. Eighth and last, there is a great amount of case law in which the Court considers an applicant vulnerable due to a combination of the factors just described: this thesis suggest

⁸⁷ Feminist legal theorists have argued that formal equality thinking is so pervasive in human rights law because of the influence of liberal values on the development of human rights (or, to put it more strongly: because human rights are founded on liberalism). See *supra* Chapter 1.III.A; and e.g., Catharine MacKinnon, *Crimes of War, Crimes of Peace*, 4 UCLA WOMEN’S LAW JOURNAL 59, 71-76(1993-94).

⁸⁸ Anna Grear, *Challenging Corporate “Humanity”: Legal Disembodiment, Embodiment and Human Rights*, 7 HUMAN RIGHTS LAW REVIEW 511, 525-534 (2007). To put the point about paradoxical inheritances differently: Judge Fohighel was right when he wrote in a 1997 dissenting opinion in a case regarding the rights of transsexuals that: “It is part of our common European heritage that governments are under a duty to take special care of individuals who are disadvantaged in any way.” See X, Y, and Z v. the United Kingdom, App. No. 21830.93, 22 April 1997 (Fohighel J., dissenting at ¶ 6). But so are colonialism and patriarchy – to name but two hierarchical systems of power – part of “our common European heritage”. That is to say: human rights law has grown out of a society that was both colonial and patriarchal, and to this day struggles with these paradoxical inheritances.

⁸⁹ See *supra* Chapter 5.III.A.

calling this “compounded vulnerability.”⁹⁰ Examples are cases about (mentally) disabled prisoners, or young children who have been (sexually) abused.

It should be emphasized that this list is continuously evolving and that the Court by no means constantly uses vulnerability to refer to these different kinds of applicants. Especially as regards immigrants and asylum seekers, Chapter Five has argued, the Court is inconsistent and irresolute in its use of the concept of vulnerability.⁹¹ In the context of deportation, the Court only seems to acknowledge vulnerability due to political persecution but not embodied vulnerability due to illness, food shortage and other factors. The Court thus regularly ends up denying the vulnerability of asylum seekers who claim to be vulnerable.⁹²

D) On the effects of (group-)vulnerability in the case law of the ECtHR

Once the Court holds that an applicant is vulnerable this has real consequences in the case law. These consequences are quite far-reaching. Chapter Four mapped what the effects are of group-vulnerability and Chapter Five did the same for the concept of vulnerability more generally.⁹³ On the basis of this research, the conclusion is that whether the Court reasons from group-based vulnerability or from individual vulnerability, the effects are quite similar. What follows is an overview of these effects.

i. Enhanced positive obligations

Vulnerability prompts enhanced positive obligations on the part of the State.⁹⁴ This effect of vulnerability is not limited to any of the Convention rights in particular. The Court routinely holds that particularly vulnerable people require “special consideration to” or “special protection of” their “specificities” and “needs.”⁹⁵ These extra positive obligations have taken many forms, and only the most noteworthy developments will be mentioned here.

⁹⁰ See *supra* Chapter 5.III.A.viii.

⁹¹ See *supra* Chapter 5.III.A.vi.

⁹² See, e.g., *Samina v. Sweden*, app. No. 55463/09, 20 October 2011, ¶ 62-64; and *S.H.H. v. United Kingdom*, App. No. 60367/10, 29 January 2013.

⁹³ See *supra* Chapter 4.IV and Chapter 5.IV.

⁹⁴ See *supra* Chapter 4.IV.A.; and Chapter 5.IV.B.

⁹⁵ See, e.g., *Chapman v. United Kingdom* (GC), 2001-I; 33 Eur. H.R. Rep. 18, ¶ 96 (2001); *M.S.S. v. Belgium and Greece*, App. No. 30696/09, 53 Eur. H.R. Rep. 2, ¶ 251 (2011); and *Yordanova v. Bulgaria*, App. No. 25446/06, 24 April 2012, ¶ 128 and 129; *Zehentner v. Austria*, App. No. 20082/02, 16 July 2009, (2011) 52 Eur. H.R.R. 22, ¶ 63.

To start, vulnerability considerations have led to the Court on several occasions to extend positive obligations into the socio-economic sphere. In *M.S.S. v. Belgium and Greece*, for example, the Court held Greece responsible under Article 3 of the Convention for not addressing the situation of extreme material deprivation in which the applicant, an asylum seeker, found himself.⁹⁶ Another example is the tragic case of *Nencheva and Others v. Bulgaria* (2013).⁹⁷ In this case the Court held the Government responsible for the deaths of 15 children and young adults (violation of Article 2 ECHR). These young people were all severely mentally and/or physically disabled and lived in a State-run care home in the village of Dzhurkovo, where they had been placed with the consent of their parents or after they were abandoned by their parents. They died as a result of lack of food, medical services and heating during the harsh winter of 1996-1997. The Court held that the State should have prevented the deaths of these vulnerable applicants, positioned as they were within the control of the authorities.⁹⁸

Next, considerations of vulnerability have often induced the Court to deepen existing positive obligations; for example by turning an obligation of care into an obligation of result,⁹⁹ or by making a duty to protect more pressing. For instance, in a case concerning domestic violence against a woman, *Hajduová v. Slovakia* (2010), the Court held: “owing to the particular vulnerability of victims of domestic violence which the Court has highlighted on a number of occasions . . . the domestic authorities should have exercised an even greater degree of vigilance”.¹⁰⁰

Lastly, (group-)vulnerability considerations have formed the basis for an obligation on the part of the State to adopt positive steps to promote equality, as for example when the Court decided in *Horváth and Kiss v. Hungary* that the Hungarian Government is under an obligation “to undo a history of racial segregation in special schools.”¹⁰¹

ii. Narrowing of the margin of appreciation

⁹⁶ *M.S.S. v. Belgium and Greece*, App. No. 30696/09, 53 Eur. H.R. Rep. 2, ¶ 263 (2011).

⁹⁷ *Nencheva and Others v. Bulgaria*, App. No. 48609/06, 18 June 2013.

⁹⁸ *Id.* ¶ 119, 123, 141.

⁹⁹ *Cf. M.S. v. United Kingdom*, App. No. 24527/08, 3 May 2012; *see supra* Chapter 5.IV.B.

¹⁰⁰ *Hajduová v. Slovakia*, App. No. 2660/03, 30 November 2010, (2011) 53 Eur. H.R.R. 8, ¶ 50.

¹⁰¹ *Horváth and Kiss v. Hungary*, App. No. 11146/11, 29 January 2013, ¶ 127.

Chapter Four noted that group-vulnerability has caused the Court to narrow the margin of appreciation in direct discrimination cases affecting people with a disability.¹⁰² The key cases in this respect are *Alajos Kiss v. Hungary* and *Kiyutin v. Russia*, where the Court held:

If a restriction on fundamental rights applies to a particularly vulnerable group in society that has suffered considerable discrimination in the past, then the State's margin of appreciation is substantially narrower and it must have *very weighty reasons* for the restrictions in question.¹⁰³

In my view, this reasoning might well expand to judgments that concern discrimination on grounds other than disability. Interestingly, the Court has already transposed the *Alajos Kiss/Kiyutin* reasoning in terms of group-vulnerability to judgments concerning other human rights violations affecting people with a disability. Thus, the Court has held that group-vulnerability also triggers strict scrutiny under Article 5(1) (the right to liberty and security of person).¹⁰⁴ The idea of group-vulnerability as a rationale for tightening the Court's scrutiny is definitely on the rise.

iii. Weight in the proportionality analysis / relevance in determining whether a case falls within the scope of Article 3

A further impact of applicants' vulnerability is manifested in the Court's proportionality analysis.¹⁰⁵ As Judge Power said in a dissent; "vulnerability is a factor to be weighed in the balance."¹⁰⁶ Take for instance *Yordanova v. Bulgaria*, about the planned forced eviction of a decades-old Roma settlement.¹⁰⁷ The Court held:

¹⁰² See *supra* Chapter 4.IV.C. Lourdes Peroni and I added the caveat that neither in *Alajos Kiss* nor in *Kiyutin* does group vulnerability in and of itself narrow the margin of appreciation. Group vulnerability is one of a constellation of factors determining the margin of appreciation.

¹⁰³ *Kiyutin v. Russia*, App. No. 2700/10, 53 Eur. H.R. Rep. 26, ¶ 63 (2011); and *Alajos Kiss v. Hungary*, App. No. 38832/06, 20 May 2010, ¶ 42.

¹⁰⁴ *Zagidulina v. Russia*, App. No. 11737/06, 2 May 2013, ¶ 52 ("The Court is mindful that individuals suffering from a mental illness constitute a particularly vulnerable group and therefore any interference with their rights must be subject to strict scrutiny, and only "very weighty reasons" can justify a restriction of their rights (see *Alajos Kiss v. Hungary*, no. 38832/06, § 42, 20 May 2010).").

¹⁰⁵ See *supra* Chapter 4.IV.B, and Chapter 5.IV.A.2.

¹⁰⁶ *F.H. v. Sweden*, App. No. 32621/06, 20 January 2009 (Power and Zupančič J., dissenting).

¹⁰⁷ *Yordanova v. Bulgaria*, App. No. 25446/06, 24 April 2012.

In the context of Article 8, in cases such as the present one, the applicants' specificity as a social group and their needs must be one of the relevant factors in the proportionality assessment that the national authorities are under a duty to undertake.¹⁰⁸

In this quote the Court does not mention the vulnerability of the Roma as a social group, but in the text of the judgment the reference to their vulnerability comes in the same paragraph. *Yordanova* makes clear that States are under an obligation to take the vulnerability of a group in consideration when determining the proportionality of measures that affect it,¹⁰⁹ and, by extension, that the Court will also weigh vulnerability in its own proportionality assessment.

In parallel, vulnerability is an aggravating factor in Article 3 cases: ill-treatment of vulnerable persons is more likely to reach "the minimum level of severity" required to fall under the scope of that provision. The idea is that vulnerable applicants are likely to experience harm more acutely.¹¹⁰ An example is the Belgian "*Tabitha*" case.¹¹¹ Tabitha was a five-year-old Congolese girl who was detained all by herself for two months in a closed center for illegal immigrants near Brussels, before being deported back, alone, to Congo. The Court held:

The second applicant's position was characterised by her very young age, the fact that she was an illegal immigrant in a foreign land and the fact that she was unaccompanied by her family from whom she had become separated so that she was effectively left to her own devices. She was thus in an extremely vulnerable situation. In view of the absolute nature of the protection afforded by Article 3 of the Convention, it is important to bear in mind that this is the decisive factor . . .¹¹²

The Court subsequently found that Article 3 was breached both on account of Tabitha's detention and on account of her deportation. Tabitha's extremely vulnerable situation is what makes the treatment of her by the Belgian authorities so egregious as to amount to inhuman treatment.

¹⁰⁸ *Id.* ¶ 129.

¹⁰⁹ *See also id.* ¶ 132 ("the disadvantaged position of the social group to which the applicants belong could and should have been taken into consideration").

¹¹⁰ Other examples are *M.S.S. v. Belgium and Greece*, App. No. 30696/09, 53 Eur. H.R. Rep. 2, ¶ 232 (2011); and *R.R. v. Poland*, App. No. 27617/04, 26 May 2011, ¶ 159 ("applicant was in a situation of great vulnerability . . . She suffered acute anguish . . .").

¹¹¹ *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, App. No. 13178/03, 12 October 2006, (2008) 46 E.H.R.R. 23.

¹¹² *Id.* ¶ 55.

The inclusion of (group-)vulnerability in the proportionality analysis by no means guarantees a favorable outcome to the vulnerable applicant; there are always also other factors laying in the balance.¹¹³ At a minimum, vulnerability considerations have created a *bottom line* in the Court's proportionality analysis: Governments that completely ignore the particular situation of vulnerable applicants will not pass the Strasbourg proportionality test.¹¹⁴ What is more, Lourdes Peroni and I argued in Chapter Four, the inclusion of vulnerability in the proportionality analysis will increase some applicants' chances of obtaining protection. It is partly for this reason that Chapter Five referred to vulnerability as a "prioritization tool": it can serve to prioritize the claim of the applicant over the countervailing-interests brought forward by the Government.¹¹⁵ In *Nencheva* the Court explicitly mentions that vulnerability ought to have prioritizing force. The Court recognizes that the winter of 1996/97 was an exceptionally difficult time for Bulgaria due to a deep financial crisis.¹¹⁶ Nevertheless, the Court held, the authorities should have prioritized responding to the needs of the vulnerable young persons in the care home.¹¹⁷

iv. Prioritization in the Court's agenda-setting

The other way in which the vulnerability of applicants acts as a prioritization tool relates to the manner in which the Court manages its workload. The Court has developed a "priority policy", which determines the order in which the Court reviews cases. Chapter Five has argued that embodied vulnerability is a key consideration underlying this policy: some particularly vulnerable applicants – like children and people who are facing deportation – receive an accelerated review of their case by the Court.¹¹⁸

E) On the ability of vulnerability in the case law of the ECtHR

In the final analysis, the increasing emphasis on the concept of vulnerability is a welcome development in the legal reasoning of the Strasbourg Court. Vulnerability reasoning has resulted in many context- and

¹¹³ See for example *Chapman v. United Kingdom* (GC), 2001-I; 33 Eur. H.R. Rep. 18, ¶ 114 (2001).

¹¹⁴ See *supra* Chapter 5.IV.A.2.

¹¹⁵ *Id.*

¹¹⁶ *Nencheva and Others v. Bulgaria*, App. No. 48609/06, 18 June 2013, ¶ 26.

¹¹⁷ *Id.* ¶135 ("En particulier, ils ont établi que les autorités responsables n'avaient pas pris de décisions pour réagir avec priorité à la nécessité de protéger les personnes vulnérables qu'étaient les enfants placés au foyer de Dzhurkovo face à un risque accru pour leur santé et leur vie au cours de cette période difficile.").

¹¹⁸ See *supra* Chapter 5.IV.A.i.

applicant-sensitive judgments. The question is how deep the concept reaches. In my view, which is informed by Fineman's thesis, the Court's vulnerability reasoning oscillates between substantive equality and transformative equality, just as it oscillates between inclusion and transformation.¹¹⁹

Lourdes Peroni and I argued in Chapter Four that the emergence of the vulnerable group concept has contributed toward a more substantive interpretation of equality in the Court's case law.¹²⁰ As was mentioned in the introduction to this thesis, a "hallmark of a formalist approach to equality is that it is decontextualized; it employs disembodied reasoning and it privileges 'abstract principles over material facts'."¹²¹ Vulnerable group reasoning redresses this in the Strasbourg jurisprudence: it is reasoning that is much more sensitive to context, embodiment and concrete materiality. On a conceptual level, Lourdes and I offered the following diagnosis: in response to the exclusions of human rights law, the Strasbourg Court has been forced to attend to the constructed disadvantage of certain groups, and in so doing, has deployed the concept of group vulnerability.¹²² On this level, therefore, the Court's use of group vulnerability can be seen as an attempt at including previously excluded groups in the human rights universal. It does this through an asymmetrical approach to the Convention: focusing on groups that have suffered disadvantage and who experience human rights violations more routinely or more acutely.¹²³ This is a valuable endeavor, but it does not necessarily signal a fundamental transformation of the not-really-universal human rights universal. Nor, Chapter Five has argued, does the Court completely move beyond deeply entrenched notions of liberal legal subjecthood.¹²⁴

The main problem bedeviling both the more specific "vulnerable groups" concept (discussed in Chapter Four) as well as the Court's vulnerability reasoning generally (discussed in Chapter Five), is that – unlike Fineman – the Court conceptualizes vulnerability as something some groups have the misfortune to suffer from. The Court's vulnerable subjects (described above in section III.C) are examples of marginalized and stigmatized subjects; as such they are no alternative to the liberal subject, but typical examples of liberalism's "Others".¹²⁵ Through the lens of Fineman's vulnerability thesis, it becomes apparent that labeling only prisoners, people with a disability, children etc. as vulnerable, does not

¹¹⁹ The term oscillating is inspired by Titia Loenen's chapter entitled *Indirect Discrimination: Oscillating between Containment and Revolution*, in *NON-DISCRIMINATION LAW: COMPARATIVE PERSPECTIVES* 195 (Titia Loenen & Peter R. Rodrigues eds., 1999). See *supra* Chapter 1.III.A on the meanings of formal, substantive and transformative equality.

¹²⁰ See *supra* Chapter 4.IV.

¹²¹ See *supra* Chapter 1.III.A.

¹²² See *supra* Chapter 4.IIC.

¹²³ See *supra* Chapter 4.IV.

¹²⁴ See *supra* Chapter 5.III.B.

¹²⁵ *Id.*

dislodge the fiction that the normal subject of human rights law is an *invulnerable* subject (who does not suffer from such impediments as dependence on the State or power differences).

Moreover, as regards the vulnerable group concept more specifically, Lourdes Peroni and I have argued that it risks reinforcing the very exclusion and inequality it seeks to redress. It is in that sense a double-edged sword. Drawing on the case law of the Court, Chapter Four has established that, if the concept is not applied carefully, an emphasis on group-vulnerability can be essentialistic, stigmatic, and paternalistic.¹²⁶ Chapter Four argued that the Court can avoid these pitfalls by carrying out a contextual analysis that consists of two levels of inquiry: collective and individual. This means that the Court should in the first place specify why it considers a certain group particularly vulnerable, and then demonstrate how the group's vulnerability reflects on the situation of the concrete applicant. These two levels of inquiry are also necessary to avoid harmful stereotyping: labeling an applicant "vulnerable" only because her group is vulnerable, can have very disempowering consequences.¹²⁷

At the same time, the Court's vulnerability reasoning holds seeds of transformation. For one thing, the implications of vulnerability as a prioritizing tool, as a rationale for narrowing the margin of appreciation, and as a tool to further develop positive obligations, are potentially quite far reaching. Moreover, vulnerability reasoning could be used to inform more than just cases brought by marginalized subjects such as asylum seekers, prisoners, people with a mental disability and female victims of domestic violence.¹²⁸ The case law holds out hope that the Court may, one day, transcend the vulnerability/invulnerability binary and take legal reasoning into a far more radical direction; namely towards the vulnerable subject as being, not just a marginal subject, but the paradigm subject of rights.¹²⁹ This is the ideal posited by Martha Fineman, Anna Grear and other vulnerability theorists.¹³⁰

A likely objection is that when the Court starts considering everybody vulnerable, the concept loses its power. If we are all vulnerable, what potential has this concept then to enrich legal reasoning? True, as both Chapters Four and Five noted, the Strasbourg Court utilizes vulnerability more for its ability to capture the particular than for its ability to capture the universal. It is submitted, however, that the Court could do both. The Strasbourg Court can continue relying on vulnerability to explore what renders applicants vulnerable in particular situations, and simultaneously also rely on vulnerability to underline what all people have in common – like dignity. What this would change are the stigmatic and

¹²⁶ See *supra* Chapter 4.III.C.

¹²⁷ See *supra* Chapter 6.II.E (discussion of the *Pretty* and *S.A.S.* cases) and see *infra* "synergies" Part IV.B.

¹²⁸ See *supra* Chapter 6.III.C, see also Chapter 5.III.A.

¹²⁹ I thank Anna Grear, to whom I owe this clear formulation.

¹³⁰ In the next section I explain why I think this ideal is ultimately unattainable.

equality-reinforcing effects of vulnerability. It would underline that not just “others” are vulnerable and that not just “others” need the human rights protection that is offered by the Strasbourg Court.¹³¹ It is not the aim of this thesis to provide “a blueprint for judicial review” on the basis of a vulnerability thesis,¹³² nevertheless the case law analysis of Chapter Five does raise one suggestion as to how the Court might frame vulnerability in more universal terms.¹³³ That is that the Court could perhaps connect dignity and embodied vulnerability more solidly together – making clear that the injunction to respect human dignity needs to be interpreted in light of vulnerability considerations – as, indeed, the Court has already done in Article 3 cases concerning detainees and prisoners.¹³⁴

F) On the vulnerability of the Court itself

In my view, what ultimately and inescapably bounds the transformative potential of the Court’s vulnerability reasoning is the vulnerability of the Court itself. Thus, within the ECtHR context, the vulnerability thesis predicts its own limits. Especially the Court’s recognition that vulnerability can prompt special positive obligations and can trigger a stricter margin of appreciation has raised concerns that the Court is overstepping its proper role.¹³⁵ If the Court takes its vulnerability reasoning too far – and on a conceptual level this would mean jettisoning the liberal subject in favor of a vulnerable subject – no State would listen any more. The Court would not survive as a supranational human rights court.

Inherent in a vulnerability approach – such as this dissertation envisages it, based, e.g., on the work of Fineman – is the recognition of the vulnerability of the very institute it encourages to adopt a transformative approach. This raises the objection that this study wants to be idealistic and realistic at the same time. That is true. In fact, it is another of the paradoxes of vulnerability that this thesis does not seek to iron out: as a thesis, vulnerability is destined to sit in between the real and the ideal, between the is and the ought, and between law and critique.¹³⁶ On the level of ideals, vulnerability aims

¹³¹ The idea that only “others”, or in other words “the bad guys”, need the Strasbourg Court is incipient in some of the recent Strasbourg-bashing. For discussion, see, e.g., Lucy Scott-Moncrieff, *Language and law: reclaiming the human rights debate*, EUROPEAN HUMAN RIGHTS LAW REVIEW 115 (2013).

¹³² Martha Albertson Fineman, *Beyond Identities: The Limits of an Antidiscrimination Approach to Equality*, 92 BOSTON UNIVERSITY LAW REVIEW 1713, 1763 (2012). As is discussed *supra* in Chapter 1.III.C., Fineman does not see her vulnerability thesis as a model for judicial review either.

¹³³ See *supra* Chapter 5.IV.B.

¹³⁴ See, e.g., *M.S. v. United Kingdom*, App. No. 24527/08, 3 May 2012, ¶¶ 41 and 44; and *Grimailovs v. Latvia*, app. No. 6087/03, 25 June 2013, ¶¶ 161.

¹³⁵ See *supra* Chapter 4.V.

¹³⁶ See *supra* Chapter 5.VI.

to create a discourse that does not pit “us” against “them”, but instead celebrates a shared humanity. In view of all the recent disparagement of the Strasbourg Court, it seems to me that this would be exactly the kind of discourse the Court needs right now.

IV. Stereotype and vulnerability: tension and synergies

To a large extent, (anti-)stereotyping and vulnerability are presented here as two separate approaches – or methods, if you will – of strengthening the Strasbourg Court’s legal reasoning. These approaches are also different in their origins: the focus on stereotyping is developed in this thesis as a response to a social/empirical problem, whereas the focus on vulnerability is conceived in response to the Strasbourg jurisprudence.¹³⁷ It is now time to address both the synergies and the tension between these two approaches.

A) Tension

It might appear contradictory to turn to both the concept of stereotype and the concept of vulnerability to argue in favor for a more transformative notion of equality in the legal reasoning of the Strasbourg Court. The anti-stereotyping approach can after all be perceived as a species of classic equal protection law analysis. An anti-stereotyping approach does not reject the idea of protected grounds such as sex, race, disability, sexual orientation and religious belief, which then correspond to protected identity groups.¹³⁸ In contrast, the vulnerability approach, at least as formulated by Fineman, proposes a universalist perspective. Fineman has formulated her thesis as a direct challenge to group- and identity-based equality thinking.¹³⁹ I expect, therefore, that especially in American quarters this PhD thesis would raise the objection of inconsistency. Fineman herself recently wrote:

The state should have a rigorous duty to ensure for everyone both equal protection of the law and equal opportunity to enjoy the benefits of society. If monitoring is restricted to rooting out discrimination against or stereotyping of personal characteristics, however, the state will only

¹³⁷ See also *supra* Chapter 1.III.B and C.

¹³⁸ See *generally* about protected grounds, SANDRA FREDMAN, *DISCRIMINATION LAW* 110-143 (2nd ed. 2011).

¹³⁹ See, e.g., Fineman, *supra* note 132.

ever be able to partially achieve that objective. To reflect a rigorous commitment to equality it will be necessary to move beyond identities and beyond our current understanding of discrimination to a more universal perspective. . . in order to have a more robust equality-based society it will be necessary to move beyond individual identities and discrimination as it is now understood and adopt a more structural and institutional perspective.¹⁴⁰

There is admittedly an ambivalence in the double focus of this PhD, in that it supports both a particular/identity-based approach and an universal approach. But whereas Fineman explicitly opts for universality as the most promising road to equality,¹⁴¹ In common with many other commentators, I think on the other hand that “a rigorous commitment to equality” encompasses both an appreciation of universality and an appreciation of identity.¹⁴² In my view, a vulnerability approach is not necessarily at odds with an (anti-)stereotyping approach. That would only be the case if the stereotype concept can only deliver formal equality (as, indeed, some American scholars maintain¹⁴³). My reading of the concept of stereotype, however, is that it can be deployed to advance transformative equality goals. An anti-stereotyping approach could and should aim at the underlying structures of discrimination and inequality, which is precisely what Fineman also wants a vulnerability approach to do.

B) Synergies

In order for the stereotype and vulnerability approaches to be complementary strategies in the goal of equality as transformation, this section will draw out the linkages between these two concepts.

On the empirical level, stereotyping and vulnerability are interconnected in at least two ways: human vulnerability is frequently the driving force behind the formation of stereotypes, and stereotyping renders some people extra vulnerable. To start with the first observation: the notion that individuals, as well as cultures, develop stereotypes as a response to their particular vulnerabilities, is studied by social psychologists within the framework of what is known as “terror management theory”.

¹⁴⁰ *Id.* at 1752 and 1755.

¹⁴¹ Fineman is not alone in advancing a universality-based approach to equality. *See also, e.g.*, Kenji Yoshino, *The New Equal Protection*, 124 HARVARD LAW REVIEW 747- 803 (2011) (who turns towards “dignity”). *See for more discussion* Jessica A. Clarke, *Beyond Equality? Against the Universal Turn in Workplace Protections*, 86 INDIANA LAW JOURNAL 1219 (2011).

¹⁴² Many scholars have made this point more generally in relation to human rights. *See, e.g.*, EVA BREMS, HUMAN RIGHTS: UNIVERSALITY AND DIVERSITY (2001) (who has coined the term “inclusive universality”); and Dembour, *supra* note 86, at 178-180.

¹⁴³ *See supra* Chapter 3.I.

This “theory suggest that people have culturally derived views of the world and their place in it – views that, among other things, protect them from their own fears of death and vulnerability to injury.”¹⁴⁴ In other words, the content of stereotypes is in part shaped by the experience of vulnerability: stereotypes “provide protection against deeply rooted existential fear.”¹⁴⁵ Terror management theory also suggests that there is an increased likelihood that people *use* stereotypes when they are confronted with their own vulnerability to death.¹⁴⁶

The second empirical observation, namely that stereotyping renders some (groups of) people extra vulnerable, perhaps requires no further explanation. This fact is unfortunately amply illustrated in the case law of the Strasbourg Court. Take for example the case of *P. and S. v. Poland* (2012).¹⁴⁷ P. was a 14 years old girl who was pregnant as a result of rape. When she sought to obtain a legal abortion, several hospitals refused to help her. Several doctors, anti-abortion groups and a priest tried to convince her to carry the pregnancy to term. The medical information she received was misleading. In its judgment, the Court rightly recognizes that P. was in a “situation of great vulnerability” as a teenager who was pregnant as a result of rape.¹⁴⁸ What happened in this case was that her vulnerability was further compounded by the authorities who tried to impose the prescriptive stereotype that “a (prospective) mother should sacrifice herself for her child”. Because they acted on this stereotype, P. did not receive the medical care that she was entitled to and, furthermore, she was humiliated, manipulated and harassed. The prescriptive stereotyping of P. clearly further exacerbated her vulnerability.¹⁴⁹

On the level of legal reasoning, the stereotype and vulnerability concepts can work together. In the first place, the vulnerable group reasoning explored in Chapter Four is a form of stereotyping. Thus it is, for example, a statistical stereotype to say that “Roma are vulnerable”: the Roma are indeed

¹⁴⁴ SCHNEIDER, *supra* note 76, at 368. See also, e.g., Jeff Schimel e.a., *Stereotypes and Terror Management: Evidence that Mortality Salience Enhances Stereotypic Thinking and Preferences*, 77 JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY 905 (1999).

¹⁴⁵ Schimel e.a., *supra* note 144, at 907.

¹⁴⁶ *Id.* at 922.

¹⁴⁷ *P. and S. v. Poland*, App. No. 57375/08, 30 October 2012.

¹⁴⁸ *Id.* ¶ 161-162.

¹⁴⁹ While the vulnerability reasoning in *P. and S. v. Poland* is quite elaborate, the Court’s stereotype reasoning leaves much to be desired. The Court condemns the pressure that was exerted on the applicant, but does not name the prescriptive stereotype. Neither does the Court analyze this instance of prescriptive gender stereotyping as a form of discrimination against women, even though the applicant had made this claim in her submission. See for discussion Johanna Westeson, *P and S v Poland: adolescence, vulnerability and reproductive autonomy*, STRASBOURG OBSERVERS, 5 November 2012. <http://strasbourgoobservers.com/2012/11/05/p-and-s-v-poland-adolescence-vulnerability-and-reproductive-autonomy/>.

statistically more vulnerable than other groups, but that does not mean that all the individuals from this group fit the statistic in every circumstance. Some Roma will in fact be highly successful and not particularly vulnerable. To repeat, this is why Lourdes and I have proposed that the Court carries out an inquiry at the individual level as well as the collective level when faced by applicants from so-called vulnerable groups: to ensure that the stereotype does not turn harmful.¹⁵⁰ When it is deployed well, the Court's vulnerable group concept is a form of "strategic stereotyping",¹⁵¹ though it is doubtful whether the Court thinks of it in those terms.

Secondly, vulnerability considerations can play a role in the assessment of whether the application of a stereotype is harmful or not. The specificities of a person's or a group's vulnerability will namely to a large extent determine what impact the application of a stereotype has on that person or group. In all four contextual factors that this thesis has urged the Court to take into account when assessing stereotypes – historical context, effects, fit and ameliorative purpose – vulnerability reasoning can be incorporated, depending on the case.¹⁵²

Lastly, an (anti-)stereotyping approach can help uncover the constructed vulnerability of certain groups of people. In *Alajos Kiss* and *Kiyutin*, for example, the Court recognized that legislative stereotyping helped construct the vulnerability of people with a mental disability, and people living with HIV respectively. Moreover, in these judgments the Court already seems to acknowledge that stereotyping and vulnerability amplify each other. The Court namely notes that:

. . . such [vulnerable] groups were historically subject to prejudice with lasting consequences, resulting in their social exclusion. Such prejudice could entail legislative stereotyping which prohibited the individualised evaluation of their capacities and needs.¹⁵³

Stereotyping and vulnerability are held here to amplify each other, because stereotyping increases the vulnerability of certain groups and – at the same – these groups' vulnerability is what makes the stereotyping in these cases so particularly egregious.

¹⁵⁰ See *supra* Chapter 4.III.C ("ways of lessening these risks").

¹⁵¹ Analogous to the idea of "strategic essentialism." Strategic essentialism is broadly conceived of as strategically utilizing essential notions of identity, while recognizing the falsity of the idea of an essential reality. The term was first coined by Gayatri Spivak, but later widely used among feminists. See for discussion, e.g., Vanessa E. Munro, *Resemblances of Identity: Ludwig Wittgenstein and Contemporary Feminist Legal Theory*, RES PUBLICA 137, 144-148 (2006).

¹⁵² See *supra* Chapter 6.II.E.

¹⁵³ *Kiyutin v. Russia*, App. No. 2700/10, 53 Eur. H.R. Rep. 26, ¶ 63 (2011); and *Alajos Kiss v. Hungary*, App. No. 38832/06, 20 May 2010, ¶ 42.

These are some of the ways in which the (anti-)stereotype and vulnerability concepts are complementary in the legal reasoning of the Strasbourg Court. Possibly there are more synergies between these concepts. It is hoped that, together and separately, these concepts can help strengthen the Court's legal reasoning about non-dominant groups and help create a more transformative equality analysis.

V. Topics for Future Research

In the context of human rights law, both the concept of stereotype and the concept of vulnerability raise many questions that unfortunately fell outside the remit of this thesis. Both concepts call for further exploration by human rights law scholars.

To start, it will be interesting to explore stereotyping more broadly as a human rights issue. The Strasbourg Court's emergent recognition of the harm of stereotyping can be viewed as part of a broader development in which several international human rights bodies – including the CEDAW Committee, the Committee on the Elimination of Racial Discrimination (CERD), the Committee on the Rights of Persons with Disabilities (CRPD) and the Inter-American Court of Human Rights – increasingly address the issue. Most of the time, however, scholars of stereotyping have limited their investigations to individual human rights bodies. Moreover, the bulk of the literature focuses narrowly on only one kind of stereotype, namely gender stereotypes. In my opinion a broader set of questions now need attention: How do invidious stereotypes affect the enjoyment of human rights? How came the language of stereotyping to be included in human rights treaties such as CEDAW and CRPD? Does human rights law manage to capture the harms of stereotyping? How are compounded stereotypes addressed in human rights law? Can human rights law be improved in these respects? What potential has a focus on stereotypes to develop a more robust notion of equality in human rights law? How could the Strasbourg Court benefit by the approach other international human rights bodies have taken towards stereotyping?

These and other questions related to stereotyping as a human rights issue will be thought through at a seminar which is organized by Eva Brems and myself at Ghent University on December 4, 2013. For this seminar I plan to delve into the issue of remedies: what kinds of remedies for stereotyping are

indicated by human rights law? More specifically, I hope to address the question of what kinds of positive obligations the obligation to address stereotyping entails.

As regards the concept of vulnerability, this invites a far more extended level of theoritization in the context of human rights law than has been attempted in the literature so far. Such a project could consist of both a descriptive and a prescriptive part. The descriptive part could put central the question to what extent the human rights project is based on an appreciation of universal human vulnerability. This would require an interdisciplinary investigation on the crossroads of law, history and philosophy. Subsequently, the prescriptive part of the project could explore what implications a theory of universal vulnerability as the foundation of human rights has for human rights practice. Going one step further, perhaps this research project could even attempt to fashion a model of judicial review for the Strasbourg Court and/or other human rights adjudicating bodies on the basis of the vulnerability thesis.

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